



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 2044 078 589 793



RARY

igitized by Google







9

REPORTS

OF

CASES HEARD AND DETERMINED

BY THE

SUPREME COURT

OF

SOUTH CAROLINA.

---

**VOLUME XVIII.**

CONTAINING CASES OF APRIL AND NOVEMBER TERMS, 1882.

---

BY ROBERT W. SHAND,  
STATE REPORTER.

---

JERSEY CITY, N. J.:  
FREDERICK D. LINN & CO., LAW PUBLISHERS AND BOOKSELLERS.  
1883.

*Rec. Nov. 9, 1883*

# JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

---

## JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER,

HON. SAMUEL MCGOWAN.

## CIRCUIT JUDGES.

FIRST CIRCUIT, HON. BENJAMIN C. PRESSLEY.

SECOND " " ALFRED P. ALDRICH.

THIRD " " THOMAS B. FRASER.

FOURTH " " JOSHUA H. HUDSON.

FIFTH " " JOSEPH B. KERSHAW.

SIXTH " " ISAAC D. WITHERSPOON.

SEVENTH " " WILLIAM H. WALLACE.

EIGHTH " " JAMES S. COTHRAN.

## ATTORNEYS-GENERAL.

HON. LEROY F. YOUNG,

" CHAS. RICHARDSON MILES.\*

## SOLICITORS.

1st Circuit.—W. ST. J. JERVEY.

5th Circuit.—R. G. BONHAM.

2d Circuit.—F. H. GANTT.

6th Circuit.—T. C. GASTON.

3d Circuit.—J. J. DARGAN.

7th Circuit.—D. R. DUNCAN.

4th Circuit.—G. W. DARGAN.

8th Circuit.—J. L. ORR.

## CLERK OF THE SUPREME COURT.

A. M. BOOZER.

---

\* Elected at general election in November, 1882.



# TABLE OF CASES

## Reported in this Volume.

---

<p style="text-align: center;"><b>A.</b></p> <p>Abrams v. Carlisle..... 242</p> <p>Anderson, State <i>ex rel.</i>, v. Sims... 460</p> <p>Attorney-General, State <i>ex rel.</i>, v. Railroad Co.....38, 87, 289, 299</p> <p>Ayer v. Chassereau..... 597</p> <p style="text-align: center;"><b>B.</b></p> <p>Babb, Wilson v..... 59</p> <p>Bank, <i>Ex parte</i> Carolina National v. Gary..... 239</p> <p>—— v. Harbin..... 282</p> <p>—— Holmes &amp; Durham v..... 425</p> <p>Barnes, McGrath &amp; Byrum v..... 31</p> <p>Bell v. Towell..... 606</p> <p>Benedict, Hall &amp; Co. v. Flanigan 94</p> <p>Bennett &amp; Co., Charleston Rice Milling Co. v..... 506</p> <p>Benson &amp; Co., <i>Ex parte</i>..... 254</p> <p>Blake, <i>Ex parte</i>..... 38</p> <p>Boles, State <i>ex rel.</i>, Jones v..... 603</p> <p>Bratton v. Massey..... 534</p> <p>Briggs, Nichols v..... 555</p> <p>Brown and wife, <i>Ex parte</i>..... 473</p> <p style="text-align: center;"><b>C.</b></p> <p>Carlisle, Abrams v..... 87</p> <p>Carlton, Pearson v..... 242</p> <p>Carolina National Bank, <i>Ex parte</i> 47</p> <p>Carter v. DuPre..... 289</p> <p>Cathcart v. Sugenhimer..... 179</p> <p>Chalmers v. Glenn..... 123</p> <p>Chandler, Suber v..... 469</p> <p>Chapman v. Lipscomb..... 526</p> <p>Charles v. Jacobs..... 222</p> <p>Charleston Rice Milling Co. v. Bennett &amp; Co..... 598</p> <p>Chassereau, Ayer v..... 254</p> <p>Chester, State <i>ex rel.</i>, Coleman v.. 597</p> <p>Christian v. Lebeschultz..... 464</p> <p>Christopher v. Christopher..... 602</p>	<p>Cleveland v. Cohrs..... 599</p> <p>Cohrs, Cleveland v..... 599</p> <p>Coleman v. Dunlap..... 591</p> <p>—— State <i>ex rel.</i>, v. Chester.. 464</p> <p>Conant, State <i>ex rel.</i>, v. Fuller.... 246</p> <p>Cothran, Noble v..... 439</p> <p>County Commissioners v. County Commissioners..... 439</p> <p>County of Newberry, Wheeler v. 597</p> <p>Crawford v. Dougherty..... 132</p> <p style="text-align: center;"><b>D.</b></p> <p>Davis v. McDuffie..... 486</p> <p>Dougherty, Crawford v..... 495</p> <p>—— Garrison v..... 486</p> <p>Dunlap, Coleman v..... 591</p> <p>DuPre, Carter v..... 179</p> <p style="text-align: center;"><b>E.</b></p> <p>Earle v. Harrison..... 329</p> <p>Eason v. Miller &amp; Kelly..... 381</p> <p>Edwards, Miller v..... 600</p> <p>Ellen v. Ellen..... 489</p> <p>Evans, State v..... 137</p> <p><i>Ex parte</i> Benson &amp; Co..... 38</p> <p>—— Blake..... 603</p> <p>—— Brown and wife..... 87</p> <p>—— Carolina National Bank 289</p> <p>—— Layne..... 87</p> <p>—— Williams..... 299</p> <p style="text-align: center;"><b>F.</b></p> <p>Finley, Trumbo v..... 305</p> <p>Flanigan, Benedict, Hall &amp; Co. v. .... 506</p> <p>Foot &amp; San v. Williams..... 601</p> <p>Foster v. Fowler..... 607</p> <p>Fowler, Foster v..... 607</p> <p>—— Pearson v..... 47</p> <p>Fuller, State <i>ex rel.</i>, Conant v..... 246</p>
---	--



<b>G.</b>		<b>Kibler v. Luther.....</b>	606
Garrison v. Dougherty.....	486	Kinsman, Sharp v.....	108
Gary, National Bank v.....	282	Koon v. Munro.....	374
Gettys, Kerchner v.....	521		
Gibbes v. R. R. Co.....	38, 87, 289, 299	<b>L.</b>	
Gilmore v. Roberts.....	551	Lasure v. Graniteville Manufac-	
Glenn, Chalmers v.....	469	turing Co.....	275
Gowan, McMakin v.....	502	Layne, <i>Ex parte</i> .....	87
Graniteville Manufacturing Co.,		Lebeschultz, Christian v.....	602
Gunter v.....	262	Linder, Ross v.....	605
Graniteville Manufacturing Co.,		Ling, Railroad Company v.....	116
Lasure v.....	275	Lipscomb, Chapman v.....	222
Graves v. Spoon.....	386	Long v. Schmidt.....	604
Greenville & Columbia R. R. Co.,		Luther, Kibler v.....	606
Gibbes v.....	38, 87, 289, 299		
Gunter v. Graniteville Manufac-		<b>M.</b>	
turing Co.....	262	Macaulay, Sawyer, Wallace &	
Gunter v. Gunter.....	193	Co. v.....	543
		Mancke, State v.....	81
<b>H.</b>		Massey, Bratton v.....	555
Hagood, State <i>ex rel.</i> , v. Thomp-		Mathews, Pope v.....	444
son.....	538	McBurney, Hyatt v.....	199
Haithecock, Simonds v.....	604	McDuffie, Davis v.....	495
Hall, Miller v.....	141	McGrath & Byrum v. Barnes.....	606
Harbin, State Savings Bank v.....	425	McMakin v. Gowan.....	502
Hardin v. Howze.....	73	Miller v. Edwards.....	600
Harrelson, Johnson v.....	604	— v. Hall.....	141
Harrison, Earle v.....	329	Miller & Kelly, Eason v.....	381
Henderson, Howard v.....	184	Moore, Herndon v.....	339
Herndon v. Moore.....	339	Moses, State of South Carolina v.	366
Hirshkind & Co. v. Israel.....	157	Munro, Koon v.....	374
Holmes & Durham v. National		Myers, Tobin v.....	324
Bank.....	31		
Hope, Kaminer v.....	561	<b>N.</b>	
Houser, Whaley v.....	602	National Bank v. Gary.....	282
Howard v. Henderson.....	184	— — — Holmes & Dur-	
Howze, Hardin v.....	73	ham v.....	31
Huckabee, Kerchner v.....	521	Newberry, Wheeler v.....	132
Huff v. Watkins.....	510	Nichols v. Briggs.....	473
Hyatt v. McBurney.....	199	Noble v. Cothran.....	439
<b>I.</b>		<b>O.</b>	
Israel, Hirshkind & Co. v.....	157	Oliver v. White.....	235
		O'Neill v. O'Neill.....	360
<b>J.</b>			
Jacobs, Charles v.....	598	<b>P.</b>	
Johnson v. Harrelson.....	604	Padgett, State v.....	317
Jones, State <i>ex rel.</i> , v. Boles.....	534	Pagan, Patterson v.....	584
Jowers v. Stansell.....	607	Patterson v. Pagan.....	584
		Pauk, State v.....	514
		Pearson v. Carlton.....	47
<b>K.</b>			
Kaminer v. Hope.....	561		
Kerchner v. Gettys.....	521		
— — — Huckabee.....	521		

# TABLE OF CASES.

vii

Pearson v. Fowler.....	47
Pope v. Mathews.....	444
Putnam, State v.....	175

## R.

R. R. Co., Gibbs v.....	38, 87, 289, 299
—— v. Ling.....	116
Roberts, Gilmore v .....	551
Ross v. Linder.....	605

## S.

Sawyer, Wallace & Co. v. Macaulay.....	543
Schmidt, Long v.....	604
Schumpert v. Smith.....	358
Sharp v. Kinsman.....	108
Simonds v. Halthcock.....	604
Sims, State v.....	603
Sims, State <i>ex rel.</i> , Anderson v....	460
—— <i>Williams v.</i> .....	603
Smith, Schumpert v.....	358
—— State v.....	149
Spoon, Graves v.....	386
Stunsell, Jowers v.....	607
State Savings Bank v. Harbin....	425
State v. Evans.....	137
—— Mancke.....	81
—— Moses.....	366
—— Padgett.....	317
—— Paulk.....	514
—— Putman.....	175
—— Sims.....	603
—— Smith.....	149
—— Turner.....	103
—— <i>Williams.</i> .....	605
State, <i>ex rel.</i> Anderson, v. Sims...	460
—— Attorney-General, v.	
Railroad Co.....	38, 87, 289, 299

State, <i>ex rel.</i> Coleman, v. Chester..	464
—— Conant, v. Fuller.....	246
—— County Commissioners.....	597
State, <i>ex rel.</i> Hagood, v. Thompson	538
—— Jones, v. Boles.....	534
—— <i>Williams, v. Sims</i> .....	603
Suber v. Chandler.....	526
Sugenheimer, Cathcart v.....	123
<i>Symmes v. Symmes.</i> .....	601

## T.

Thompson, State, <i>ex rel.</i> Hagood, v.	538
Tobin v. Myers.....	324
Tompkins v. Tompkins.....	1
Towell, Bell v.....	94
Town Council, State, <i>ex rel.</i> Coleman, v..	464
Trumbo v. Finley.....	305
Turner, State v.....	103

## W.

Walker, Fleming & Co., Williams v.....	577
Watkins, Huff v.....	510
Watts, Witherspoon v.....	396
W. C. & A. R. R. Co. v. Ling..	116
<i>Whaley v. Houser</i> .....	602
Wheeler v. Newberry.....	132
White, Oliver v.....	235
Williams, <i>Ex parte.</i> .....	299
—— v. Walker, Fleming & Co.....	577
—— <i>Williams, Foot &amp; Son v.</i> .....	601
—— State v.....	605
—— State <i>ex rel.</i> , v. Sims.....	603
Wilson v. Babb.....	59
Witherspoon v. Watts.....	396



## CASES CITED BY THE COURT.

### A.

Abrahams v. Kelly, 2 S. C. 238.....	545
Adickes v. Lowry, 12 S. C. 108.....	233
Agnew v. Adams, 15 S. C. 36.....	242
Aldrich v. Cooper, 8 Ves. 382.....	434
Amick v. Frazier, Dud. 341.....	553
Annely v. DeSausure, 12 S. C. 488, 17 <i>Id.</i> 389.....	603
Arnold v. Rock River Valley Union R. R. Co., 5 Duer 207.....	288
United States, 9 Cr. 119.....	86
Ashley v. Holman, 15 S. C. 106 .....	127, 131
Atcheson v. Robertson, 3 Rich. Eq. 137.....	21
Atlas Bank v. Brownell, 9 R. I. 168.....	120

### B.

Bagley v. Johnston, 4 Rich. 22.....	316
Baily v. Baily, 9 Rich. Eq. 392.....	500
Ball v. Oliver, 2 Ves. & B. 97.....	575
Banbury Peerage Case, 1 Sim. & St. 153.....	71
Bank of Augusta v. Earle, 13 Pet. 519.....	525
Banks v. Searles, 2 McM. 356.....	583
Barnes v. Gorman, 9 Rich. 297.....	288
Barrett v. Charleston Bank, 2 McM. 194.....	595
Bastard v. Bastard, 2 Show 82.....	42
Bedon v. Bedon, 2 Bail. 231.....	57
Bennett v. Bell, 10 Rich. Eq. 466.....	256
Mathewes, 5 S. C. 478 .....	508
Benton v. Gibson, 1 Hill 56. ....	595
Bird v. Millar, 1 McM. 125.....	508
Railroad Company, 8 Rich. Eq. 54.....	604
Bofil v. Fisher, 3 Rich. Eq. 1.....	58
Bollman v. Bollman, 6 S. C. 44.....	230
Boman v. Plunkett, 2 McC. 518.....	508
Bond Debt Cases, 12 S. C. 282.....	355
Bones v. Booth, 2 W. Bl. 1227.....	310
Bouknight v. Epting, 11 S. C. 76.....	188
Boyce v. Lake, 17 S. C. 481.....	328
Bratton v. Massey, 15 S. C. 277.....	559
Bright v. Boyd, 1 Story 478.....	132
Brown v. Buttz, 15 S. C. 488.....	499
Cozard, 68 Ill. 180.....	436
Leigh, 49 N. Y. 79.....	316
Wood, 6 Rich. Eq. 360.....	560

Brunn v. Chicago, &c., R. R. Co., 53 Iowa 595.....	272
Buckingham v. Billings, 13 Mass. 82.....	241
Bugg v. Summer, 1 McM. 333.....	532
Bull v. Rowe, 13 S. C. 370.....	183
Burdet v. Hopegood, 1 P. Wms. 486.....	56
Burney v. Pledger, 3 Rich. 191.....	184

## C.

Carver v. Jackson, 4 Pet. 1.....	493
Chalk v. Patterson, 4 S. C. 98.....	217
Chapman v. Lester, 12 Kans. 592.....	436
Chicago, &c., R. R. Co. v. Iowa, 4 Otto 155.....	42
Chichester v. Hastie, 9 S. C. 334.....	315
Childers v. Verner, 12 S. C. 4.....	313
Christian Union v. Yount, 101 U. S. 352.....	525
Christmas v. Russell, 5 Wall. 290.....	210
Citizens Bank v. Nantucket Steamboat Co., 2 Story 35.....	42
City Council v. Ahrens, 4 Strobb. 241.....	106
Corleis, 2 Bail. 186.....	83
Heissembuttel, 2 McM. 233.....	106
Clarke v. Blake, 2 Ves. Jr. 673.....	56
Clark v. Tompkins, 1 S. C. 119.....	29
Cleveland v. Cohrs, 10 S. C. 224.....	484, 599
13 S. C. 397.....	599
Jones, 3 Strobb. 479.....	553
Clinkscales v. Hall, 15 S. C. 602.....	371
Cole, <i>qui tam</i> , v. Smith, 4 Johns. 193.....	312
Colly v. Crocker, 17 Kans. 527.....	436
Commissioner v. Thomson, 4 McC. 434.....	352
Conlin v. City Council, 15 Rich. 201.....	271
Cooke v. State National Bank, 52 N. Y. 97.....	36
Corcoran v. Holbrook, 59 N. Y. 517.....	272
Corley v. Williams, 1 Bail. 588.....	583
County of Richland v. Miller, 16 S. C. 244.....	135
Cowdrey v. Railroad Company, 1 Wood 331.....	45, 295
Creighton v. Pringle, 3 S. C. 97.....	217
Crocker v. Marine National Bank, 101 Mass. 240.....	36
Cureton v. Hutchinson, 3 S. C. 606.....	315
Watson, 3 S. C. 458.....	217

## D.

Daniel v. Swearengen, 6 S. C. 304.....	511
Davenport v. Caldwell, 10 S. C. 317.....	348, 359
Davidson v. Moore, 14 S. C. 266.....	30
Davis v. Vaughan, 7 S. C. 343.....	601
Day v. Hill, 2 Spears 629.....	443
DeBruhl v. Neuffer, 1 Strobb. 426.....	147
Dent v. Bryce, 16 S. C. 1.....	542
Dial v. Gary, 14 S. C. 579.....	589
Dillard v. Brian, 5 Rich. 501.....	328

# TABLE OF CASES CITED.

xi

Dixon v. Ramsay, 3 Cr. 319.....	588
Doud v. Sanders, Harp. Eq. 277.....	452
Duncan v. Barnett, 11 S. C. 333.....	239
Dunford v. Woodman, 10 Pick. 426 ..	241
Dunlap v. Dunlap, 4 Desaus. 305 .....	102
Dupasseur v. Rochereau, 21 Wall. 130.....	208

## E.

Earle v. Anderson, 9 S. C. 460.....	215
Eason v. Miller & Kelly, 15 S. C. 194 .....	383
Easterling v. Thompson, Rice 346.....	575
Edmonston v. Aiken, 14 S. C. 622.....	135
Eigleberger v. Kibler, 1 Hill Ch. 113.....	528
Ellen v. Ellen, 16 S. C. 132.....	492
Ewer v. Hobbs, 5 Metc. 1.....	436
Executors of Brasher v. Van Cortlandt, 2 Johns. Ch. 242.....	129
<i>Ex parte</i> Benson & Co., 18 S. C. 38.....	295
Brown and wife, 15 S. C. 532.....	45, 89, 295
Carolina National Bank, 18 S. C. 289.....	304
Childs, 12 S. C. 118.....	136
DeHay, 3 S. C. 564.....	85
Drayton, 1 Desaus. 136.....	130
Graham, 13 Rich. 277.....	481
Mackey, 15 S. C. 323.....	251
Williams, 7 S. C. 72.....	135

## F.

Faber v. Police, 10 S. C. 385.....	192
Fancourt v. Thorn, 9 Ad. & E. (N. S.) 312 .....	286
Farr v. Farr, 1 Hill Ch. 387.....	528
Faulkner v. Davis, 18 Gratt. 651.....	58
Fields v. Fowler, 2 Hun 400.....	131
Fifty-four Bonds Case, 15 S. C. 304.....	46, 295
Fitchburg R. R. Co. v. Gage, 12 Gray 393.....	42
Ford v. Dangerfield, 8 Rich. Eq. 110.....	575
Fitchburg R. R. Co., 110 Mass. 240.....	271
Fox v. Railroad Company, 4 S. C. 543.....	545
Fretz v. Stover, 22 Wall. 198.....	221
Fuller v. Jewett, 80 N. Y. 46.....	273

## G.

Gaillard v. Trenholm, 5 Rich. 356.....	316
Gallivan v. Evans, 1 Ball & B. 192.....	575
Gasque v. Small, 2 Strobb. Eq. 76.....	501
Gates v. Whetstone, 8 S. C. 246.....	21
Gelpcke v. Dubuque, 1 Wall. 175.....	354
Gibbes v. Chisolm, 2 N. & McC. 38.....	147
Holmes, 10 Rich. Eq. 487.....	483
Railroad Co., 13 S. C. 253.....	484
Gill v. Douglas, 2 Bail. 387.....	575



<i>Gillett v. Powell</i> , Spears Eq. 145.....	483
<i>Glover v. Glover</i> , McM. Eq. 154.....	453
<i>Gray v. Bell</i> , 3 Rich. 72.....	595
<i>Seigler</i> , 2 Strobb. 117.....	583
<i>Green v. Van Buskirk</i> , 5 Wall. 307.....	211
<i>Greenville v. Runion</i> , 9 S. C. 4.....	135
<i>Grimke v. Brandon</i> , 1 N. & McC. 356.....	553
<i>Guardian v. Stratton</i> , 22 L. T. Eng. 84.....	121
<i>Gunter v. Graniteville Man. Co.</i> , 15 S. C. 443.....	267
18 S. C. 262.....	282

## H.

<i>Harley v. Platts</i> , 6 Rich. 318.....	184
<i>Hammond v. Railroad Co.</i> , 15 S. C. 34.....	606
<i>Hardin v. Howze</i> , 2 S. C. 229.....	75
<i>Harris v. Packard</i> , 3 Taunt. 264.....	42
<i>Hayne v. Hood</i> , 1 S. C. 23.....	251
<i>Haynsworth v. Frierson</i> , 11 Rich. 476.....	599
<i>Hellams v. Abercrombie</i> , 15 S. C. 110.....	442
<i>Herndon v. Moore</i> , 18 S. C. 339.....	358
<i>Hext v. Porcher</i> , 1 Strobb. Eq. 171.....	453
<i>Walker</i> , 5 Rich. Eq. 7.....	561
<i>Higginbottom v. Peyton</i> , 4 Rich. Eq. 316.....	560
<i>Holmes &amp; Calder v. Charleston</i> , 14 S. C. 146.....	135
<i>Horn v. Lockhart</i> , 17 Wall. 570.....	208, 221
<i>Hough v. Railway Co.</i> , 100 U. S. 213.....	273
<i>Howard v. Robinson</i> , 5 Cush. 119.....	436
<i>Huff v. Watkins</i> , 15 S. C. 87.....	511

## I.

<i>In re Kennedy</i> , 2 S. C. 216.....	75
<i>Isherwood v. Olknow</i> , 3 M. & S. 396.....	356

## J.

<i>Jenkins v. Freyer</i> , 4 Paige 52.....	56
<i>Jenney v. Laurens</i> , 1 Spears 356.....	189
<i>Johnson v. Pensacola &amp; Perdido R. R. Co.</i> , 16 Fla. 623.....	42
<i>Jones v. Kilgore</i> , 2 Rich. Eq. 63.....	443
<i>Read</i> , 1 Humph. 345.....	530
<i>Tapling</i> , 12 Com. B. (N. S.) 846.....	356

## K.

<i>Kaniner v. Hope</i> , 9 S. C. 253.....	571
<i>Kennedy v. Reames</i> , 15 S. C. 550.....	182
<i>Ketchum v. Buckley</i> , 99 U. S. 188.....	222
<i>Kid v. Mitchell</i> , 1 N. & McC. 334.....	184
<i>Kirksey v. Keith</i> , 11 Rich. Eq. 33.....	505
<i>Klinck v. Black</i> , 14 S. C. 246.....	604
<i>Knight v. Duplessis</i> , 1 Ves. Sr. 325.....	575
<i>Knotts v. Stearns</i> , 91 U. S. 638.....	57

## TABLE OF CASES CITED.

xiii

Koon v. Munro, 11 S. C. 140.....	375
Krom v. Levy, 60 N. Y. 126.....	86

## L.

Lancashire v. Lancashire, 5 T. R. 49.....	56
Laurens v. Lucas, 6 Rich. Eq. 226.....	215
Lay v. Lay, 10 S. C. 208.....	29
Leaphart v. Leaphart, 1 S. C. 199.....	571
Leroy v. Crowninshield, 2 Mason 151.....	550
Levy v. Boas, 2 Bail. 217.....	549
License Cases, 5 How. 504.....	106
Lumpkin v. Ferguson, 10 Rich. 424.....	443
Lupo v. True, 16 S. C. 586.....	395

## M.

Madsden v. Phoenix Fire Ins. Co., 1 S. C. 29 .....	545
Mart v. Rucker, 1 Humph. 347.....	530
Mars v. Conner, 9 S. C. 79.....	560
Mason v. Johnson, 13 S. C. 20. ....	315
Mathison v. Hanks, 2 Hill 625.....	583
Mauldin v. Gossett, 15 S. C. 565.....	209
Mayer v. Mordecai, 1 S. C. 399.....	217
McArthur v. Martin, 23 Minn. 80.....	437
McBurney v. Carson, 99 U. S. 571.....	207
McCall v. Cohen, 16 S. C. 448.....	245
McCaughrin & Co. v. Williams, 15 S. C. 505.....	484
McColman v. Wilkes, 3 Strobb. 465.....	553
McCreight v. Aiken, 3 Hill 338, Rice 58.....	125
McDonald v. Pickett, 2 Bail. 618.....	442
McDuffie v. McIntyre, 11 S. C. 551.....	221
McElmoyle v. Cohen, 13 Pet. 324.....	210, 550
McGowan v. Hitt, 16 S. C. 602.....	533
McGrath v. Barnes, 13 S. C. 328.....	607
McLure v. Ashby, 7 Rich. Eq. 430.....	532
McNamee v. Waterbury, 4 S. C. 155.....	351
McNish v. Guerard, 4 Strobb. Eq. 66.....	188, 353
McPherson v. Gray, 14 Rich. Eq. 128.....	217
Means v. Feaster, 4 S. C. 249.....	528
Means, 4 Desaus. 243 .....	100
Meyer v. Construction Co., 100 U. S. 457.....	212
Mills v. Duryea, 7 Cr. 483.....	210
Mobley v. Davega, 16 S. C. 73.....	145
Mobley, 7 Rich. 432.....	315
Mogg v. Hodges, 2 Ves. 53.....	432, 434
Moore v. Hood, 9 Rich. Eq. 327.....	128
Morton & Co. v. Naylor, 1 Hill 439.....	549
Murray v. Railroad Co., 1 McM. 385.....	271
Murrell v. Dicky, 1 John. Ch. 153.....	589
Muse v. Peay, Dud. Eq. 236.....	560

## N.

Nance v. Nance, 1 S. C. 218.....	453, 457, 460
Noonan v. Bradley, 9 Wall. 400.....	589

## O.

Oakes v. Howell, 27 How. Pr. 145.....	505
O'Neill v. Bookman, 9 Rich. 80.....	147
Sims, 1 Strobb. 115.....	147
Ortley v. Messere, 7 Johns. Ch. 139 .....	130
Osborn v. Hawley, 19 Ohio 130.....	288
Ostendorff v. County Commissioners, 14 S. C. 403.....	135

## P.

Parker v. Jacobs, 14 S. C. 112.....	174
Pearson v. Dansby, 2 Hill 466.....	553
Peek v. North Staffordshire R. R. Co., 10 H. L. Cas. 511.....	42
Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 581.....	350, 371
Pender v. Lancaster, 14 S. C. 28.....	240
People v. Garbutt, 17 Mich. 9 .....	519
S. F. Union, 31 Cal. 132.....	542
Person v. Warran, 14 Barb. 488.....	131
Peters v. Barnhill, 1 Hill 234.....	442
Peterson v. Chemical Bank, 32 N. Y. 40 .....	589
Petrie v. Shoemaker, 24 Wend. 85.....	128
Pettus v. Clawson, 4 Rich. Eq. 103.....	25, 28
Phillips v. Foxall, 3 Moak Eng. R. 264 .....	121
Phipps v. Ackers, 9 Cl. & F. 598 .....	356
Pittsburg, F. W. & C. R. R. Co. v. Shaffer, 59 Pa. St. 350.....	121
Prince v. Nance, 7 S. C. 351.....	239

## R.

Railway Company v. Ramsey, 22 Wall. 328.....	212
Ramsay v. Marsh, 2 McC. 252.....	188
Ray v. Adams, 45 Ala. 168.....	437
Read v. McNulty, 12 Rich. 445 .....	288
Regina v. Sussex, 2 Best & S. 680.....	356
Reid v. Hood & Burdine, 2 N. & McC. 168.....	246
Reynolds v. Torrance, 2 Brev. 49 .....	589
Robbins v. Slatterly, MS. Dec. No. 712.....	386
Robertson v. Carson, 19 Wall. 106.....	207
Robinson v. National Bank, 81 N. Y. 392.....	38
Rogers v. Randall, 2 Spears 38 .....	184
Roper v. Sangamon Lodge, 91 Ill. 518.....	120
Russell & Co. v. Follin, MS. Dec. No. 799.....	601

## S.

Sanders v. Rogers, 1 S. C. 452.....	217
Scaife v. Thomson, 15 S. C. 338.....	54, 100
Scott v. Pratt, 9 S. C. 83.....	601
Searle v. Chapman, 121 Mass. 19 .....	435

# TABLE OF CASES CITED.

xv

Seymour v. Preston, Spears Eq. 481.....	500
Sheriff v. Welborn, 14 S. C. 480.....	546
Shuler v. Bull, 15 S. C. 421.....	69
Sims v. McLure, 8 Rich. Eq. 286 .....	130
Singleton v. Allen, 2 Strobb. Eq. 174.....	561
Lewis, 2 Hill 408.....	147
Lowndes, 9 S. C. 465.....	217
Smith v. Carrere, 1 Rich. Eq. 123.....	576
Commonwealth, 1 Duvall 224.....	519
Grant, 15 S. C. 146 .....	337
Snow v. Railroad Co., 8 Allen 441.....	281
Spear v. Spear, 9 Rich. Eq. 184.....	457
Spencer v. Godfrey, Bail. Eq. 468.....	128
Stairly v. Rabe, McM. Eq. 22.....	422
Stafford v. Newsom, 9 Ired. 507.....	120
State v. Anderson, 1 Strobb. 455.....	152
Branham, 13 S. C. 389.....	139
Brown, 2 Spears 136 .....	323
Columbia, 12 S. C. 393. ....	230
County Treasurers, 10 S. C. 40 .....	598
Crank, 2 Bail. 66.....	151
Cullum, 2 Spears 582.....	321
Cunningham, 2 Spears 246.....	321
Fley & Rochelle, 2 Brev. 338. ....	178
Ginns, 1 N. & McC. 585.....	140
Green, 4 Strobb. 138.....	178
Hendersoh, 1 Rich. 184.....	138
Hord, 8 S. C. 84 .....	107
Major, 14 Rich. 76.....	154
McKettrick, 14 S. C. 353.....	138, 320
Montague, 2 McC. 257. ....	151
Moseley, 10 S. C. 1.....	217
Nelson, 14 Rich. 169 .....	155
O'Bannon, 1 Bail. 144.....	138
Pace, 9 Rich. 355. ....	153
Poole, 2 Tread. Con. R. 494 .....	153
Posey, 4 Strobb. 138.....	178
7 Rich. 484 .....	153
Priester, Cheves 103.....	152
Rabon, 4 Rich. 264.....	176
Railroad Company, 13 S. C. 291.....	355
Ransom, 9 S. C. 200. ....	251
Scott, 15 S. C. 434 .....	156
Shumpert, 1 S. C. 85.....	69
Tidwell, 5 Strobb. 1.....	153
Vill, 2 Brev. 262.....	321
Williams, 13 S. C. 548. ....	319
Steadfast v. Nicoll, 3 John. Cas. 18. ....	56
Stevenson v. Wilcox, 16 S. C. 432.....	575

Stinson v. Brennan, Chev. 16.....	442
Sullivan v. Jones, 14 S. C. 365.....	546
Supervisors v. Decker, 34 Wisc. 378.....	316

## T.

Taft v. Gifford, 13 Metc. 187.....	121
Teall v. Felton, 1 N. Y. 537, 2 Hill 164, 26 Wend. 192.....	35
Thellusson v. Woodford, 4 Ves. 322.....	56
Tompkins v. Tompkins, 18 S. C. 1.....	215
Towne v. Rice, 122 Mass. 67.....	286
Townsend v. Jemison, 9 How. 407.....	550
Treasurers v. Bates, 2 Bail. 362.....	442
Taylor, 2 Bail. 524.....	372
Turnbull v. Payson, 95 U. S. 423.....	208

## V.

Van Allen v. Assessors, 3 Wall. 589.....	37
Vance v. Beatty, 4 Rich. 104.....	553
Villard v. Robert, 1 Strobb. Eq. 393.....	576

## W.

Walker v. Arthur, 9 Rich. Eq. 401.....	175
Woollaston, 2 P. Wms. 576.....	574
Wallace v. Dyson, 1 Spears 127.....	288
Wallis v. Hodson, 2 Atk. 115.....	55
Wardlaw v. Buzzard, 15 Rich. 158.....	482
Hammond, 9 Rich. 454.....	125
Watertown Ins. Co. v. Simmons, 131 Mass. 85.....	121
Watson v. Hill, 1 Strobb. 78.....	553
White v. Bennett, 7 Rich. Eq. 260.....	505
Polleys, 20 Wisc. 530.....	437
Williams v. Buffy, 96 U. S. 177.....	222
Jones, 13 East 439.....	550
Kibler, 10 S. C. 414.....	100
Williman v. Holmes, 4 Rich. Eq. 476.....	191
Ostendorff, MS. Dec. No. 500.....	463
Willingham v. Chick, 14 S. C. 102.....	328
Wills v. Rich, 2 Atk. 285.....	575
Wilson v. Kelly, 16 S. C. 216.....	485
Wise v. Charlton, 4 Ad. & E. 786.....	286
Wiseman & Finley v. Hunter, 14 Rich. Eq. 175.....	217
Woods v. North, 84 Pa. St. 407.....	288
Woodson v. Palmer, Bail. Eq. 95.....	560
Wright v. Hix, 12 Geo. 162.....	72

## Y.

Yates v. Gridley, 16 S. C. 496.....	500
Young v. Herbert, 2 N. & McC. 168.....	246

## Z.

Zimmerman v. Anderson, 67 Pa. St. 421.....	287
--	-----

REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF SOUTH CAROLINA.

---

Justices of the Supreme Court during the Period comprised  
in this Volume.

HON. W. D. SIMPSON, CHIEF JUSTICE.  
HON. HENRY McIVER, ASSOCIATE JUSTICE.  
HON. SAMUEL MCGOWAN, " "

---

TOMPKINS v. TOMPKINS.

1. Cotton belonging to an estate was put into the hands of factors by one executor, and afterwards shipped and sold by direction of the other executor, and the proceeds were drawn partly by one and partly by the other. *Held*, that each was chargeable only with the amount by him received.
2. A testator advanced \$5,500 to make the one-third cash payment on a tract of land purchased by his sons. In his will, supposing himself to own a one-third interest in this land, he declared in the ninth clause that "upon the payment of \$5,500 to my estate, or the accounting therefor in the division of the residuum by my sons, F. and R., I will, devise and bequeath unto them and their heirs forever, all my interest, being the one-third part of a tract of land," &c. In the eleventh clause, the testator canceled all debts due by his sons, except "\* \* and also a



---

Syllabus.

---

- debt of \$5,500 against my sons, F. and R., mentioned in the ninth clause of my will." *Held*, that the original debt was canceled by the will, and the debt excepted in the eleventh clause did not arise, F. and R. having declined to take the land.
3. Objection to testimony as incompetent, under section 415 of the code, comes too late where first raised in exceptions to the referee's report.
  4. A partnership between testator and his son having been dissolved by the death of the former, his estate is chargeable with its proportion of all losses properly traceable to the effort to fulfill contracts binding at the time of dissolution and to expenses incurred in the legitimate effort to wind up the partnership matters, but not for losses resulting from new business.
  5. A merchant's account, contracted during the war, not being shown to have been made with reference to Confederate money as a basis of value, should not be scaled.
  6. Interest might properly be allowed by a court of equity on an open account due by testator to his executor, where interest is charged on the executor's accounts with the estate and upon the accounts between the several parties.
  7. Finding of fact by referee and Circuit judge affirmed.
  8. In the absence of evidence showing that Confederate money and bonds could have been made available for purposes of the estate, executors are not chargeable with such assets which were left by testator and came into their hands only a few months before the termination of the war.
  9. And the debts by specialty being large, and the assets apparently insufficient for their payment, a simple contract claim of one executor was not extinguished by Confederate money in testator's hands at his death in May, 1864, and received by the other executor in September following.
  10. A. and B. were equally liable as sureties for the payment of a note, and A. paid it, using in part (less than half), money of B. A. died, and, by his will, bequeathed this note to C. upon conditions which C. refused to perform. *Held*, that B. had no right to recover from A.'s estate the amount of B.'s money so used by A.
  11. In the absence of evidence showing that notes, &c., of an estate administered just after the war, could, by proper diligence, have been collected, the executors are not liable for such of these notes as were produced at the trial uncollected, the executors testifying that they had tried to collect them and failed.
  12. Executors are entitled to credit for the payment of an informal judgment rendered against themselves as executors, the debt itself being undisputed.
  13. In stating an executor's accounts, the payments made in each current year should be deducted before striking a balance to bear interest for the year in which said payments were made.
  14. A legatee receiving cotton which he sold for gold in 1865, as a part of his interest in the estate, is properly chargeable with the value of the gold in currency at that time, all the other transactions of the estate having been had in currency.

---

April Term, 1882.

---

15. Executors held liable for interest after a decree requiring them to account, they not having shown that the funds were kept on hand unemployed to meet the results of the accounting.
16. When an executor is required to account before the Court of Equity, it is no longer necessary for him to account before the ordinary, and, therefore, his failure to do so does not deprive him of his right to commissions.
17. For a failure to make returns since the adoption of the General Statutes of 1872, an executor did not forfeit his commissions, there being no law imposing such forfeiture.
18. An executor is entitled to commissions on funds that practically passed through his hands.
19. A finding of fact by referee, overruled by Circuit judge, approved.
20. An omission by referee and Circuit judge as to a matter of fact, corrected.

---

Before ALDRICH, J., Edgefield, March, 1881.

Action by J. G. Tompkins, Lucy G. Tompkins and R. A. Tompkins, a minor, against S. S. Tompkins and J. W. Tompkins, as executors of the last will of James Tompkins, deceased, James L. Tompkins and F. A. Tompkins, commenced April 23d, 1877, for settlement of the estate of James Tompkins and for an accounting by the executors. J. G. Tompkins, a son of H. W. Tompkins, was assignee of Lucy G. Tompkins, who was assignee of H. W. Tompkins, and Lucy G. Tompkins, widow, and R. A. Tompkins, an infant, were distributees of R. Augustus Tompkins, deceased, a son of testator.

James Tompkins died in May, 1864, leaving a will, the ninth and eleventh clauses of which were as follows:

9th. Upon the payment of the sum of \$5,500 to my estate, or the accounting therefor, in the division of the residuum by my sons, Franklin A. and R. Augustus Tompkins, I will, devise and bequeath unto them and their heirs forever, all my interest, being the one-third part of a tract of land in the State of Texas, county of Brazoria, and whereon my son Henry W. Tompkins now resides, and the remaining two-thirds of which are owned respectfully by my sons Henry W. of the one part, and Franklin A. and R. Augustus Tompkins of the other part.

11th. By the above bequests, I have attempted to equalize the advancements heretofore made to my children, and if any of the above negroes, given to any of my sons or grandsons,

---

Statement of the Case.

---

should die before they are received, except those given my son James L., my desire is, and I do direct, that my executors substitute one of equal value for any son's negro or negroes so dying, from my negroes not herein specially disposed of. I have also included in the estimate of advancements all notes and debts due me by any of my children, which I hereby declare canceled; excepting, however, the \$6,000 and the debt against Tompkins & Macmurphy, in the fourth clause of this, my will, which are to be paid by my son, James L. Tompkins, as therein directed, and also a debt of \$5,500 against my sons, Franklin A. and R. Augustus Tompkins, mentioned in the ninth clause of my will.

S. S. and J. W. Tompkins were appointed executors. They were then in the Confederate army, but returned to their homes in September, 1864, and qualified. The inventory and appraisal were filed in February, 1865. Testator's heirs were his widow, Huldah; his sons, Stephen S., James L., Henry W., John W., Franklin A. and R. Augustus Tompkins, and a grandson, S. J. Tompkins. Henry W. Tompkins died in 1867, intestate, leaving a widow, Lucy G., and an infant son, R. A. Tompkins. Mrs. Huldah Tompkins died in 1868, intestate, and S. J. Tompkins died intestate in 1871, and his share in the estate of his grandfather and grandmother passed by assignment of his distributees to the plaintiff, R. A. Tompkins. The estate was very considerably in debt, and, but for several very favorable compromises made by the executors, would have been insolvent. As it turned out, however, the debts were nearly all paid, and much valuable land was saved to the estate.

The facts bearing upon the points decided are generally stated in the opinion. To such statement should be added that there was no objection taken at the reference to the testimony of J. W. Tompkins as to his transactions with his deceased father; and that the sale of the White House place was a transfer to a creditor made under a power in the will in compromise of a large claim at twenty-five per cent. agreed to in consideration of certain services rendered by one of the executors. The case was referred to John R. Abney, Esq., to take the testimony and state the accounts. He reported, *inter alia*, as follows:

---

April Term, 1882.

---

On February 27th, 1864, the testator took up a note held by the bank of Hamburg against Tompkins & Macmurphy, principal, and James Tompkins and J. W. Tompkins, sureties, by paying thereon the sum of \$18,406.02. It is in testimony that the testator used \$5,355 of the money of J. W. Tompkins in taking up said note. In the fourth clause of the testator's will he bequeathed said note to J. L. Tompkins, upon the condition that he pay for the claim testator has in it, in cotton, at seventy-five cents per pound. The said J. L. Tompkins does not think he ought to pay said claim in full, and urges that the testator was indebted to him by reason of his being a part owner of the Texas land with F. A. and R. A. Tompkins, and H. W. Tompkins, who owed J. L. Tompkins a large sum of money for advances, and, also, by reason of J. L. Tompkins having a separate account of \$56.70 against the testator. As to the first discount, I do not think it should be allowed, since there is no evidence of the testator's being interested in the farming operations on said place; but as to the second, I think it proper to allow it, unless the said J. L. takes said claim strictly under the will. I think the said J. L. can either take under the said clause or refuse to do so. And, under the circumstances, I think it proper to require him to account for and pay the \$18,406.02 according to the value of said amount in good currency, as regulated by our statute. By applying the statute the amount would be reduced down to currency of the present day, and the account would stand as follows: \* \* \*

Under the ninth clause of testator's will, a bequest or devise is made to F. A. and R. A. Tompkins, which is conditional. In such cases the right of election exists, and, in my opinion, fairness and equity would be done by permitting them to decline to assume the indebtedness therein imposed on them, and to leave the matter as it stood previous to the will. Then, if that be done, the next question is, to whom did the place belong? From the testimony it appears that no title-deed had ever been drawn. H. W. Tompkins admits that he was to be one of the purchasers, but says that he had no showing. In equity, I don't think that makes any difference. The others do not appear to have designed excluding him from the benefit of

---

Referee's Report.

---

the trade, and I apprehend that his name would have been in the deed of conveyance had the credit portion of the purchase-money been paid. If, then, he was a part owner, what portion did he own? I think it clear that it was one-third; and, furthermore, I think it equally clear that the claim which James Tompkins had over the land was an equitable mortgage in its nature. Each of the three sons were to own one-third when the land was paid for, and the credit portion was to be paid out of the proceeds of the farms on the place, in which farms the brothers were equally interested. I, therefore, think that each of them should pay one-third of the \$5,500 advanced by the testator for the payment of the cash portion of the purchase-money, and their accounts for that would stand as follows: \* \* \*

It will be seen above that I have computed interest from January 1st, 1860. From F. A. Tompkins' testimony it appears that the \$5,500 was loaned about that time, or before.

**TANNING BUSINESS**—In July, 1863, the testator and his son, J. W. Tompkins, entered in a partnership for the purpose of carrying on a tannery. This firm was dissolved in January, 1864, and the stock, &c., sold for \$10,710 net. This amount was used for the purpose of taking up the Hamburg bank note against J. L. Tompkins, hereinbefore mentioned; and as J. W. Tompkins was entitled to one-half of the \$10,710, the said J. L. Tompkins is due him \$701.50, as may be seen by referring back to the account of J. L. Tompkins with the testator's estate for the amount paid in taking up said note.

In January, 1864, a new firm was organized for the purpose of tanning. It was composed of James Tompkins, J. W. Tompkins, and one Price, and styled Price & Tompkins. The business continued to be carried on after the testator's death, and was discontinued in the latter part of 1866. But before its ending, Price went out of the firm and transferred his interest to the estate of the testator and J. W. Tompkins, upon a settlement had with him. After Price had gone out of the firm there were liabilities against the firm, which J. W. Tompkins claims to have paid out of his own money. This being

---

April Term, 1882.

---

the case, the estate is indebted to him for one-half of the amount so paid. The said firm also owed J. W. Tompkins \$72, and James Tompkins \$152. The accounts would be as follows: \* \* \*

The firm obtained a patent from the United States government for tanning, which belongs to the testator's estate. I recommend that the patent and two notes, which also belong to the firm, be sold, and the proceeds applied in a settlement between them.

**MERCANTILE BUSINESS**—In January, 1858, James Tompkins and J. W. Tompkins formed a mercantile partnership, which lasted for two years. At its termination, the firm owed James Tompkins \$207.07, and, therefore, J. W. Tompkins owed the testator one-half of said sum. The accounts stand as follows: \* \* \*

The assets consisted of goods, notes and accounts, on which only \$20 was collected. I recommend that the said notes and accounts be sold, and the proceeds thereof applied to the settlement of the above account. The testator's interest in the goods was bought by J. W. Tompkins, and about the same time J. W. Tompkins, being in the shoe business with one Jennings, also purchased Jennings' interest, and consolidated the two branches of business. The account of testator has been offered in evidence. At the end of each current year, from 1861 to 1864, both inclusive, I have scaled the account down according to the schedule regulating the value of Confederate money. The accounts stand as follows: \* \* \*

**OVERSEEING ACCOUNT**—J. W. Tompkins claims that the testator was due him \$600 for services rendered in overseeing the testator's plantation during the late war. I don't think, however, that it has been shown to be due even upon an implied contract. The circumstances existing at the time the services were rendered, or evidenced by the letter of James Tompkins to the comptroller general, appear to have given the government a voice in the premises, and the implied contract thereby proved, tends to show that such services were given on



---

Statement of the Case.

---

the part of the government as in the nature of a gratuity.\* I, therefore, do not think that the claim should be allowed.

It is impossible now to make a complete statement of the accounts, as the land is not yet sold, and the choses in action on hand uncollected are also to be disposed of; but the foregoing accounts are in full compliance with the order under which I was appointed, and are sufficient to render a full settlement easily effected so soon as all the assets of the estate are sold and the proceeds collected. The plaintiffs contend that J. W. Tompkins, executor, is liable for certain, if not all, of the deficit in the account of S. S. Tompkins, executor, but it does not appear tenable ground in view of the testimony and the law. See *Gates v. Whetstone*, 8 S. C. 244.

In making a full settlement of the estate of the testator, the share of H. W. Tompkins will be charged with all liabilities, just as if it had not been assigned. The assignee took the said share subject to such charges as were proper against H. W. Tompkins. See *Code*, § 135. I recommend that the land be sold on salesday in November. \* \* \*

I further recommend that the creditors of the testator's estate, who have not been paid, be called in to prove their claims, or be required to file the same.

To this report the plaintiffs filed the following exceptions:

1. Because the referee erred in holding the estate of testator liable to J. W. Tompkins in the sum of half the amount of the liabilities of the firm of Price & Tompkins, to wit, the sum of \$1,268.42.

2. Because the referee erred in holding that the estate of testator is indebted to J. W. Tompkins in the sum of \$1,127.61 on account of the tannery.

3. Because, in respect to the tannery, the report is, in other respects, erroneous.

4. Because the referee erred in allowing J. W. Tompkins an interest in the Tompkins & Macmurphy note, paid by testator.

5. Because the referee erred in holding J. L. Tompkins in-

---

\* This was an exemption from service in the army to act as overseer for his father.—REPORTER.

---

April Term, 1882.

---

debted to the estate of testator only in the sum of \$1,717.42 on account of the Tompkins & Macmurphy note, and because, in other respects, in reference to the said note of Tompkins & Macmurphy, the report is clearly erroneous.

6. Because the referee erred in holding H. W. Tompkins indebted to the estate of testator in the sum of \$4,271.60, or in any other sum, on account of the sum of \$5,500 advanced by testator for the purchase of a tract of land in Texas.

7. Because the referee erred in holding the estate of testator indebted to J. W. Tompkins in the sum of \$3,939.23, on account of the mercantile business.

8. Because the referee erred in allowing J. W. Tompkins commissions on the proceeds of the sale of the White House place in 1873, to wit, on the sum of \$3,716.18, when the said sum did not pass through his hands.

9. Because the referee erred in allowing J. W. Tompkins credit for the sum of \$2,700, claimed to have been paid by him on account of the judgment of Jennings, Smith & Co., in the year 1876, the said judgment not being authorized by law, and being, if authorized by law, irregular, null and void, and because, if paid, was not paid out of individual funds.

10. Because the referee erred in allowing S. S. Tompkins credit for the sum of \$7,662.93, claimed to have been paid out in 1869, whereas, in that sum is included the payment of the identical Jennings, Smith & Co. judgment, embraced in the exception next above.

11. Because the referee erred in not holding J. W. Tompkins equally and jointly liable with S. S. Tompkins for the amount of the proceeds of the sale of one lot of cotton in Liverpool, to wit, the sum of \$11,923.

12. Because the referee erred in allowing the executors any commissions after the year 1866, no annual returns having been made after that time.

13. Because the referee erred in not holding the executors responsible for the notes and accounts on hand at the death of testator, no evidence being introduced showing them to have been worthless or doubtful, and no effort having been made to collect all of them.

---

Statement of the Case.

---

14. Because the referee erred in holding the executors liable for the sum in Confederate treasury notes on hand at the death of testator, to wit, the sum of \$15,535, of which only the sum of \$1,700 was charged to S. S. Tompkins.

15. Because the referee erred in not holding the executors liable, to some extent at least, for the sum of \$9,550.90 in Confederate bonds, on hand at the death of testator, in 1864.

16. Because, if the estate of testator was indebted to J. W. Tompkins on account of the mercantile business in the sum of \$3,939.23, or in any other sum, the referee erred in not canceling it by the Confederate money on hand at the time of testator's death.

17. Because the referee erred in allowing J. W. Tompkins to testify to the transactions between him and his testator as to the mercantile account, and because the said account was barred by the statute of limitations.

18. Because the referee erred in allowing defendants to amend without giving plaintiffs an opportunity to reply.

19. Because, in regard to the mercantile business, the referee erred in not giving the amount in Confederate money that was reduced, nor the rate of the reduction, to gold.

20. Because the referee erred in allowing J. W. Tompkins credit in gold for the sum of \$95.90 on account of taxes paid for P. L. Tucker, in 1865, when the amount was paid in Confederate money, and should have been reduced to gold, according to law.

21. Because the referee erred in not adjusting the rights of the parties amongst themselves, in obedience to the order of reference.

22. Because the report of the referee is, in other respects, contrary to the evidence and the law.

Exceptions of J. W. Tompkins—

1. Because the referee erred in not deducting the payments made in each current year before striking a balance.

2. Because the referee erred in not charging to the estate the amount found due this defendant for money furnished by said J. W. Tompkins to pay the Tompkins & Macmurphy note,

---

April Term, 1882.

---

testator having appropriated the note and disposed of it by his will.

3. Because the referee erred in not allowing this defendant compensation for services rendered as overseer.

4. Because the referee erred in reducing this defendant's accounts against the testator, as if the charges were made in Confederate currency, when the items charged in said accounts were charged at gold prices.

5. Because the referee erred in not allowing this defendant his part of the account of H. W. Tompkins due Jas. Tompkins & Son, and in not charging testator's share of said account against the said H. W. Tompkins.

6. Because the report of the referee is contrary to law and evidence in other respects.

Exceptions of S. S. Tompkins—

1. Because the referee erred in not deducting the payments made by the defendant for each current year before striking a balance to bear interest for the years in which said payments were made.

2. Because the referee erred in charging this defendant and F. A. Tompkins with the nominal value of the currency received by them for cotton instead of the value of such currency in constitutional money at the time received; and, further, because he demonetized gold in his statement of the account of R. A. Tompkins for cotton sold by him, though it was but the logical consequence of his mode of charging this defendant and F. A. Tompkins.

3. Because the referee erred in charging this defendant with interest, after the order of Chancellor Lesesne for him to account, on the money received by him during and after the year in which said order was made. See *Clark v. Tompkins*, 1 S. C. 119.

The Circuit decree was as follows:

This case was heard on exceptions to the report of Mr. John R. Abney, referee. The report is very long—seventy-seven pages—containing evidence, accounts and conclusions of law and

---

Circuit Decree.

---

fact. When a case is referred in which matters of fact are to be ascertained and accounts balanced, the findings of the referee, like the verdict of a jury, are conclusive on the court, unless the findings of fact are contrary to the evidence, or the statements of the account show error on their face. The exceptions to the report number thirty-one in all; hence, the labor of investigation has been much more difficult than that of decision.

Mr. James Tompkins, an eminent and wealthy citizen of Edgefield, departed this life in May, 1864, leaving of force his last will, by which he appointed his two sons, the defendants, his executors. He, with his sons, had been engaged in mercantile pursuits, a tannery, the purchase of land and various moneyed transactions. Hence, as will be seen by the report, the referee had much labor in sifting the testimony and adjusting the accounts. The main subject of controversy, however, was the sale of one hundred and thirteen bales of cotton in Liverpool. From that sale J. W. Tompkins received \$1,775, and S. S. Tompkins \$10,148.47. It is contended the executors are jointly liable for this amount. The referee was directed to take testimony, state the accounts between the executors and the estate, and between the parties; to ascertain the amounts due by the executors, and each of them, to the parties respectively; to report at what time and upon what terms the real estate should be sold, and any special matter. The referee has laboriously performed that duty.

The deceased was reputed to be a man of wealth, and doubtless, but for the misfortunes of the war, his estate would have been amply sufficient to meet all its liabilities, but, like many other estates, it proved to be insolvent. His son and executor, S. S. Tompkins, whom I have known from his early manhood, a gentleman of irreproachable character and of the highest integrity, seems to have had the chief management of the estate, and I have no doubt has acted throughout with an eye single to the best interest of all concerned. He is evidently very sensitive on the subject of his management, but I do not think has cause of uneasiness, for his frank explanation and the earnestness he has displayed throughout must disarm the most censorious and convince the most suspicious that his every effort

---

April Term, 1882.

---

has been to preserve his father's memory, advance the fortunes of his children and make the best settlement in his power for the creditors. I think it is but simple justice to give this expression of opinion here, because, from the feeling displayed by Mr. Tompkins at the hearing, he is greatly moved, as I am sure no one will suspect him of improper motive or conduct.

I repeat, the main discussion was on one exception, which applies to the sale of one hundred and thirteen bales of cotton in Liverpool. This question is, I think, settled by the case of *Gates v. Whetstone*, 8 S. C. 244. In that case all the preceding authorities on the liabilities of co-executors are very well grouped, and the rule is announced that "in this State the courts have not held an executor liable for the acts of his co-executor to which he has not contributed in some direct and active way, so as by his interference to afford not only countenance, but coöperation." The facts on which the referee has based his findings are briefly these: This cotton was stored on one of the plantations of the testator. Incendiary fires were so frequent that Mr. S. S. Tompkins became solicitous for its safety, and suggested to his brother, J. W. Tompkins, co-executor, the propriety of removing it to Augusta. In this Mr. J. W. Tompkins acquiesced; had the cotton hauled to the river, and it was shipped to Augusta.

After the war, the factors who had the cotton in charge, shipped it to Liverpool and sold it. An account was opened by the factors with the executors, who were credited with the amount of the sales. Mr. S. S. Tompkins drew \$10,148.47, and Mr. J. W. Tompkins \$1,775. Mr. S. S. Tompkins says: "The cotton was sold by my individual order, and not by concurrence of my co-executor." Mr. J. W. Tompkins says: "When I drew the \$1,775, I was under the impression that I had individual funds in the hands of the factors; at that time I did not know the cotton had been sold; did not learn it until 1868 or 1869; the shipping of the cotton was the act of my co-executor; when I drew the \$1,775, I supposed it would be charged to my individual account, and not to me as co-executor." There is a good deal of testimony on this head, but these are the salient points of the evidence of the executors, the actors in

---

Circuit Decree.

---

this transaction; they both appear to speak with frankness and candor, I think. Mr. S. S. Tompkins says: "I do not recollect if I consulted my brother about the shipment of the cotton, but I have no doubt he would have acquiesced if I had."

I have looked over the evidence carefully, and my conclusion is, that it establishes the following facts: 1. That J. W. Tompkins agreed with S. S. that the cotton was not safe on the plantation; that it should be sent to Augusta, and he superintended the removal and shipment. 2. That he did not know of the shipment to Liverpool and sale. 3. That he did not know the proceeds of the sale were credited to him and his co-executor. 4. That when he drew the \$1,775 he supposed he had funds of his own, in the hands of the factors, to pay it. 5. That he was not consulted by his co-executor when he drew the balance, nor did he know what disposition he made of the money. 6. That he lived in Cokesbury; that his father had entire confidence in his brother, his co-executor; that he was the older and a lawyer, and that he desired to leave the whole management of the estate in his hands, being unwilling to qualify as executor.

Now, I cannot see how J. W. Tompkins has "contributed in some direct and active way, so as by his interference to afford not only countenance, but coöperation." He did not know when the cotton was shipped to Liverpool and sold. He did not know that the proceeds of the sale were in the hands of the factors, and credited to him and his brother, as executors. When he drew for the \$1,775, he expected the drafts to be paid out of his individual funds. He did not know that his co-executor drew the balance, or what he did with it. How, then, can it be said that he contributed actively and directly to the act of his co-executor? I see no reason to disturb the finding of the referee on this fact, and the exception is overruled.

As to the first exception, this is also a question of fact. It was stated in the argument that no exception was taken as to the competency of J. W. Tompkins as a witness, nor does it appear by the report that such exceptions were made at the reference. If this be so, the fact was fully established by the proof, and there is no error in the finding. The exception is overruled.

---

April Term, 1882.

---

Query: Without deciding the objection as to the competency of the witness, is it not too late to make the exceptions after the coming in of the report? It is like objecting to the verdict of a jury on evidence that was permitted to go to them without challenge at the trial.

Second exception. The referee has found that a contract was to be performed at the death of the testator; the death dissolved the copartnership as to all future contracts, but I see no error in the finding of the referee as to the contracts existing at the time of the death. This exception is overruled. And so are the third, fourth and fifth exceptions. If the referee was satisfied from the evidence that this payment was made with partnership funds, I see no error in the finding, and these exceptions are overruled. The sixth and seventh exceptions embrace questions of fact and matters of account; the referee had the witnesses and books before him; he had a much better opportunity to judge what was the truth and right of the case than I have, and I will not disturb his findings. The exceptions are overruled.

The eighth exception must be sustained. If the money did not pass through the hands of the executor, J. W. Tompkins, he incurred no liability, and I do not see on what principle the referee allows commissions. It was the result of a compromise of a debt in which no money passed: simply an exchange of papers. The ninth exception must be overruled. It was no part of the inquiry referred to the referee, to try the validity of the judgment. It was found that the executors paid it in good faith; they regarded it as a valid claim, and it was certainly binding on the estate until it was set aside. The tenth exception must be sustained; it seems to be evident that the referee has committed an error here.

The twelfth exception is overruled. When I was commissioner in equity, the practice was general where an estate was taken into the Court of Equity on a bill for account, the returns to the court of ordinary ceased, because, while the accounting was going on before the commissioner, there was no necessity to undergo the expenses of another before the ordinary. Commissions were always allowed. The nineteenth exception must be sustained in part. I can very well see how, in view of the



---

Circuit Decree.

---

universal calamity that had befallen the country, and the state of public opinion in Edgefield, the executors may have concluded there was no use to incur the expense and trouble of trying to collect these old debts; they reason, if the juries interpose no obstacle, the stay law will prevent, and probably the referee shared this opinion. But there should have been an inquiry; some, if not all, may have been collected. Nor do I think it right to charge the whole to the executors. Let there be a further inquiry.

The fourteenth, fifteenth and sixteenth exceptions must be sustained; the value of Confederate money and securities that came into the hands of the executors was a proper charge against them, and should have been allowed. As to the seventeenth exception, I am in doubt if the code applies; the books were the evidence, not the witness, J. W. Tompkins. These books were as much evidence against one partner as the other. All were equally bound by them; the entries of one were the entries of the other; each had the right to correct errors or mistakes, and if one partner allows a charge made against him in his lifetime without complaint or objection, it seems hard and unjust, the moment the breath leaves the body, the books—his books—shall not prove that account. It was as much his act as the act of his partner, and it is the account, the silent witness, that speaks, not the surviving partner. The exception is overruled.

The eighteenth, nineteenth and twentieth exceptions I cannot determine; the report does not furnish me sufficient evidence to form a satisfactory judgment. The nineteenth and twentieth are denied; these must go back for further inquiry. I am sorry that severe indisposition prevented me from writing out my opinion when the argument was fresh in my memory; it was due to the earnestness, zeal and ability with which it was pressed, but my state of health, during the court and the succeeding court in Columbia, prevented. It is ordered that the report go back to the referee, or some other, as Mr. Abney is out of the county, if the counsel desire, to be reformed on the principles herein announced.

---

April Term, 1882.

---

From this decree plaintiffs and the two defendants first named appealed upon the following exceptions :

Plaintiffs' exceptions—

1. Because his Honor, the presiding judge, erred 'in deciding that the estate of James Tompkins, deceased, is insolvent.

2. Because his Honor, the presiding judge, erred in deciding the matter of fact that J. W. Tompkins simply superintended the removal and shipment of one hundred and thirteen bales of cotton, whereas, it appears from the evidence of J. W. Tompkins himself, that the said J. W. Tompkins actually took possession of the said cotton, had it entirely within his own control, and removed and shipped it upon his own responsibility.

3. Because his Honor, the presiding judge, erred in deciding as matter of fact that J. W. Tompkins did not know of the shipment of said cotton to Liverpool and the sale thereof.

4. Because his Honor, the presiding judge, erred in deciding that J. W. Tompkins did not know that the proceeds were credited to him and his co-executor.

5. Because the court erred in deciding that when J. W. Tompkins drew the \$1,775 he supposed he had funds of his own in the hands of the factors to pay it.

6. Because his Honor erred in deciding that J. W. Tompkins "was not consulted by his brother when he drew the balance, nor did he know what disposition he made of the money."

7. Because his Honor erred in deciding that J. W. Tompkins "lived in Cokesbury ; that his father had entire confidence in his brother, his co-executor ; that he was the older and a lawyer, and that he desired to leave the whole management of the estate in his hands, being unwilling to qualify as executor."

8. Because his Honor erred in not holding J. W. Tompkins equally and jointly liable with S. S. Tompkins for the amount of proceeds of the sale of said lot of cotton sold in Liverpool, to wit, the sum of \$11,623.

9. Because his Honor erred in deciding the estate of testator is liable to J. W. Tompkins in the sum of one-half the amount of the liabilities of the firm of Price & Tompkins, to wit, the

---

Statement of the Case.

---

sum of \$1,268.42, and also in deciding that this was a question of fact.

10. Because his Honor erred in deciding that the estate of testator is indebted to J. W. Tompkins in the sum of \$1,127.61 on account of tannery business.

11. Because his Honor erred in overruling the third, fourth, fifth, sixth, seventh and ninth exceptions taken by plaintiffs to the referee's report.

12. Because his Honor erred in deciding that the twelfth and seventeenth exceptions to the referee's report, submitted by plaintiffs, must be overruled.

Executors' exceptions—

1. Because his Honor erred in holding the executors accountable for any sum for the notes and accounts not collected, the same, or receipts of attorneys therefor, having been produced at the reference and proven uncollectable by the executors, and in the absence of any proof showing that the said notes and accounts, or any of them, were collectable or solvent.

2. Because his Honor erred in holding said executors liable for anything on account of Confederate treasury notes and bonds on hand at death of testator, the proof showing that the testator had invested his ward's funds in them, and executors regarded them as belonging to another trust. See *Clark v. Tompkins*, 1 S. C. 119.

3. Because his Honor erred in not ruling upon and sustaining the joint exception of said executors to the referee's report, the following being said exception, viz.: Because the referee erred in not deducting the payments made in each current year, before striking a balance to bear interest for the year in which said payments were made.

J. W. Tompkins' exceptions—

1. Because his Honor erred in not considering and sustaining the defendants' exceptions to the report of the referee herein.

2. Because his Honor erred in sustaining the plaintiffs' eighth exception to the report of the referee, the proof being that the defendant effected the compromise through his individual influ-

---

April Term, 1882.

---

ence, and borrowed a large sum of money individually to make the compromise.

3. Because the Circuit judge erred in sustaining the plaintiffs' sixteenth and nineteenth exceptions to the said report of the referee, and in recommitting the twentieth exception to said referee.

Exceptions of S. S. Tompkins—

1. Because his Honor erred in sustaining plaintiffs' exception No. 10, objecting to the credit given to S. S. Tompkins in 1869, of \$7,662.93, there being no evidence to impeach any of the vouchers or the validity of any of the debts paid, except the admission of the defendant, S. S. Tompkins, that the sum of \$1,500 of that sum was paid by his co-executor, and properly credited to him by the referee.

2. Because his Honor erred in not considering and sustaining this defendant's second exception to the referee's report, to wit: "Because the referee erred in charging this defendant and F. A. Tompkins with the nominal value of the currency received by them for cotton instead of the value of such currency in constitutional money at the time received; and, further, because he demonetized gold in his statement of the accounts of R. A. Tompkins for cotton sold by him, though it was but the logical consequence of his mode of charging this defendant and R. A. Tompkins."

3. Because his Honor erred in not considering and sustaining the defendant's third exception to the referee's report, to wit: Because the referee erred in charging this defendant with interest after the order of Chancellor Lesesne for him to account on money received by him during and after the year in which said order was made. See *Clark v. Tompkins*, 1 S. C. 119.

*Messrs. B. W. Bettis, F. H. Wardlaw*, for plaintiffs.

*Messrs. S. S. Tompkins, W. T. Gary, Ernest Gary*, for defendants.

July 12th, 1882. The opinion of the court was delivered by

---

Opinion of the Court.

---

McIVER, A. J. James Tompkins departed this life on May 9th, 1864, having first duly made and executed his last will and testament, whereby he appointed his two sons, the defendants, S. S. and J. W. Tompkins, executors. Owing, however, to the fact that these executors were both absent in the Confederate service, they did not qualify until September 25th, 1864, and the appraisement of the estate was not made until February 14th, 1865, a very short time before the termination of the recent war.

This action was commenced on April 25th, 1877, for the purpose of obtaining from the executors an accounting, and effecting a final settlement of the estate of the testator. The referee, to whom it was referred to take and state the accounts of the executors, as well as between the several parties, made his report, to which all parties filed exceptions, and the case came before the Circuit judge to be heard on said report and exceptions, and from his decree all parties have appealed. Without stating in detail the various grounds of appeal, we propose to consider the several questions which we understand are raised by the various grounds of appeal.

The first, and one of the most material questions in the case is, whether the executor, J. W. Tompkins, should be made liable to account for anything more of the proceeds of the sales of certain cotton belonging to the estate which had been sent to Liverpool, than the amount which actually went into his hands. It seems that the testator left, at the time of his death, on his plantation, a considerable lot of cotton, something over one hundred bales, and the executors, fearing that it would be lost or destroyed if allowed to remain there, on account of the disturbed and unsettled condition of things in this State at the close of the war, determined that it should be shipped to Augusta, Georgia, and the executor, J. W. Tompkins, superintended the removal and shipment.

Some time afterwards, it was shipped to Liverpool by the directions of the other executor, S. S. Tompkins, and sold, and the proceeds of the sale were placed to the credit of the estate on the books of Warren & Co., factors and commission mer-

---

April Term, 1882.

---

chants of Augusta. Of these proceeds, J. W. Tompkins drew, at different times, and in different amounts, sums amounting in the whole to \$1,775, with which he has been charged; and the balance of the proceeds, amounting to something over \$10,000, was drawn by the other executor, S. S. Tompkins; and the question is, whether J. W. Tompkins shall be charged, in his account as executor, with the whole amount, or only with the amount actually drawn by him.

It is well settled that one executor is not liable for funds which went into the hands of his co-executor, unless it is made to appear that he has paid them over to his co-executor, or has joined in the misapplication of them, or has joined in a receipt, or done some other act which enabled his co-executor to receive the funds. *Atcheson v. Robertson*, 3 Rich. Eq. 137; *Gates v. Whetstone*, 8 S. C. 246, where the authorities upon this subject are collected. We see no evidence in this case of any act done by J. W. Tompkins which enabled his co-executor to receive the proceeds of the sales of the cotton. Either of the executors had the authority to order the cotton shipped and sold, and when the proceeds of the sale were placed to the credit of the estate, either of the executors had the right to draw on such proceeds, and one could not prevent the other from so doing. We are, therefore, unable to perceive any ground upon which J. W. Tompkins can be made to account for that portion of the proceeds of the sales of the cotton which was drawn by the other executor.

The next question is, whether any of the parties can be made liable to the estate for the sum of \$5,500 advanced by the testator to make the cash payment on the Texas lands. In the view which we take of this matter, it is not important to determine which of the sons of testator were interested in the purchase of these lands, or in what proportions they were interested. The testator evidently supposed, when he made his will, that, whatever may have been the original scheme, or who were the parties to it, the eventual arrangement was that he was to have a one-third interest, his son, H. W. Tompkins, a third, and that the remaining third belonged jointly to his sons, Franklin A. and R. Augustus Tompkins. It turned out, however, that

---

Opinion of the Court.

---

no title had ever been obtained for these lands, nothing having been paid on the purchase-money, except the amount advanced by the testator to make the cash payment, and that the land was surrendered to the vendor, Smith.

Whether this would have given the testator a claim on those of his sons for whom he advanced the money, need not be considered, for any such claim was released by the express terms of the eleventh clause of the will, in which the testator, after stating that, by the preceding bequests, he had attempted to equalize the advancements previously made to his children, uses this language: "I have also included in the estimate of advancements *all notes and debts* due me by any of my children, which I hereby declare canceled, excepting, however, the \$6,000 and the debt against Tompkins & Macmurphy in the fourth clause of this, my will, which are to be paid by my son, James L. Tompkins, as therein directed; and, also, a debt of \$5,500 against my sons, Franklin A. and R. Augustus Tompkins, mentioned in the ninth clause of my will." If, therefore, any indebtedness existed on the part of any of the sons, to the testator, growing out of the advance made by him to meet the cash payment on the Texas lands, such indebtedness is expressly canceled by the terms of the eleventh clause of the will.

It is argued, however, that the indebtedness of \$5,500, on the part of the two sons, Franklin A. and R. Augustus, is expressly excepted, and that they, therefore, remain liable to the estate for the same. We do not so understand it. The debt against them, which is excepted, is the debt which the testator supposed he was creating against them by the terms of the ninth clause of his will, and not the indebtedness growing out of the original transaction. Hence, we do not see how any charge can be made against any of the sons for any indebtedness which any of them may have incurred to the testator by reason of his having advanced the money for the cash payment on the Texas lands, because all such indebtedness is canceled by the express terms of the eleventh clause of the will. Nor do we see how any charge can be made against Franklin A. and R. Augustus Tompkins by reason of the debt mentioned in the ninth clause of the will, because no such debt could arise unless these two sons accepted

---

April Term, 1882.

---

the devise given by the ninth clause, which, of course, they have not done, and will not do, as the thing devised turns out not to be the property of the testator.

The next point made is that J. W. Tompkins, under section 415 of the code, was not competent to testify as to any transactions with the testator. This objection came too late, and, therefore, it is unnecessary to consider whether it could have been sustained, even if taken at the proper time.

Our next inquiry is, whether the claim of J. W. Tompkins against the estate for one-half of the losses resulting from the tanning business can be sustained. The facts presented in the record are not sufficient to enable us to determine this question. The original partnership between the testator and his son, J. W. Tompkins, for the purpose of carrying on the tanning business, seems to have been formed in 1863, and was dissolved in January, 1864, when a new partnership was formed, composed of the testator, his son J. W. Tompkins, and one Price.

This partnership was, of course, dissolved on May 9th, 1864, by the death of the testator, but the business was continued after that time by the survivors, the allegation being that the partnership was then under large contracts with third parties which it was bound to perform. Price subsequently transferred his interest in the partnership to the estate of the testator and the other partner, J. W. Tompkins, and retired from the concern. The business of the partnership, when finally wound up, resulted in a loss of something over \$1,200, for one-half of which the surviving partner, J. W. Tompkins, claims that the estate is liable to him, he having paid the liabilities of the firm.

The partnership was dissolved on May 9th, 1864, by the death of the testator, and the rule is, that after that time the surviving partner could continue the business only so far as was necessary to settle existing demands and complete transactions begun, but unfinished, at the time of the dissolution, but no further. As is said in *Gow Part. 231*: "From the nature of a partnership, engagements may be contracted which cannot be fulfilled during its existence, exposed, as it is, to sudden and arbitrary terminations; and the consequence, therefore, must be, that, for the purpose of making good outstanding engagements,



---

Opinion of the Court.

---

of taking and settling all the accounts, and converting all the property, means and assets of the partnership, existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and proportions, the legal interest subsists, although, for all other purposes, the partnership is actually determined.

In this case it does not appear how the losses were incurred, whether in fulfilling contracts existing at the time of the dissolution, and in a legitimate effort to wind up the affairs of the partnership, or whether they were the result of new business undertaken after the dissolution. There must, therefore, be an inquiry as to this point, and so much of the losses as are properly traceable to the effort to fulfill contracts existing at the time of the dissolution, and which the partnership was bound to perform, or to expenses incurred in a legitimate effort to wind up the affairs of the partnership, will constitute a legitimate partnership debt, and the estate will be chargeable with its proper proportion thereof. But so far as such losses resulted from any new business undertaken after the dissolution, they are not chargeable to the estate of the testator.

There seems to have been one item charged twice by the referee against the estate of the testator, viz.: The amount (\$72) claimed to have been paid by J. W. Tompkins for one month's board of six hands, inasmuch as it appears in the general tan-yard account, and is also made a separate charge against the estate. This, also, will be inquired into and rectified if it has, in fact, been twice charged.

The next point is as to the mercantile account claimed by J. W. Tompkins as a charge against the estate. The correctness of this charge depended largely upon a question of fact, and we see no reason for interfering with the conclusion of the referee, concurred in by the Circuit judge, except as to the matter of scaling this account. It does not necessarily follow, that a contract should be scaled because it was made during the war. The question is, whether the contract was made with reference to Confederate States' notes as a basis of value, and, until that is made to appear, there is no ground for applying the scale fixed by the act. We see no evidence in this case that this

---

April Term, 1882.

---

account was contracted with reference to Confederate States' notes as a basis of value, and, on the contrary, the inference would be, from the prices charged for many of the articles, that it was not.

It is urged, however, that interest on this account should not have been allowed. There is no exception raising this distinct point, and it is not, therefore, properly before us. We may say, though, that while it is true that open accounts do not bear interest, yet sometimes equity allows interest upon demands, as to which interest is not recoverable at law, upon the principle that it would be inequitable to withhold it. *Pettus v. Clawson*, 4 Rich. Eq. 103. We can, then, very well understand why the referee and the Circuit judge should have thought that it was but just and equitable to allow it in this instance, inasmuch as interest had been charged upon the accounts of the executors with the estate, as well as upon the accounts between the several parties.

As to the claim for overseers' wages, we see no reason for interfering with the finding of fact by the referee concurred in by the Circuit judge.

The next question is, whether the executors should have been charged with the Confederate bonds and Confederate treasury notes on hand at the death of the testator. It will be observed that these assets were not money in the legal sense of the term, and should, therefore, be treated as any other personal property. It must also be remembered that, owing to the condition of things existing at the time of the testator's death, the currency of the war, and the absence of the executors in the Confederate service, together with the disturbed and unsettled condition of things generally, these assets did not come into the hands of the executors until a very short time before the end of the war, when they lost what little value they may have previously had. It seems to us, therefore, that if these assets became valueless in the hands of the executors without any fault upon their part, and without some evidence that they were used, or could have been used, for the benefit of the estate, the executors should not be charged with them.

As has been said, they did not come into the hands of the

---

Opinion of the Court.

---

executors until a very short time before the war terminated, and there is no evidence that, within that short time, they could have been used in payment of debts of the estate, or otherwise made available. Indeed, in the condition in which the country then was, it is not at all likely that they could have been so used; and even if they had possessed the legal attributes of money, it would, perhaps, have been hazardous for the executors to have appropriated such money to the payment of any particular debt, when the estate seemed inevitably doomed to insolvency, before they had taken time to look around and ascertain the rank and amount of the heavy debts due by the estate.

It is urged, however, that, at least, the claims now presented by the executor, J. W. Tompkins, should have been extinguished by the Confederate treasury notes on hand. But these assets went into the hands of the other executor, and he certainly would not have been justified in applying them to simple contract claims of his co-executor, when he knew that there were very heavy outstanding specialty claims against the estate, with every prospect that the assets of the estate would prove insufficient for the payment of its debts. We see no ground, therefore, for charging the executors, or either of them, with the Confederate bonds or notes left by the testator, especially when the executor who was principally active in the management of the estate, and who, according to the testimony, was possessed to the fullest extent of the testator's confidence, testifies that he understood that these assets were investments made by his father, of the funds of his wards, and did not really belong to the estate.

Our next inquiry is, whether the estate should be held liable to J. W. Tompkins for the amount furnished by him to the testator to take up the note of Tompkins & Macmurphy to the bank of Hamburg. It seems that the testator and J. W. Tompkins were the sureties of Tompkins & Macmurphy on a note to the bank of Hamburg, and that, a short time before his death, the testator took up this note, using for that purpose some money belonging to J. W. Tompkins, not amounting, however, to one-half of the sum paid on the note. How this could give J. W. Tompkins any claim against the estate of the testator, we are at a loss to conceive. He and the testator were

---

April Term, 1882.

---

both liable to the holder of the note for the full amount of it, and, as between themselves, each was liable for one-half, and unless J. W. Tompkins furnished more than one-half of the amount used in taking up the note, he could have no claim against the estate of the testator.

It is contended, however, that inasmuch as the testator, by his will, undertook to dispose of the note, the transaction must be regarded as a loan by J. W. Tompkins to the testator of the amount advanced by him, and, therefore, that the estate is liable to refund to J. W. Tompkins the amount borrowed from him. It is true that the testator does undertake, by his will, to give to his son, J. L. Tompkins, one of the firm of Tompkins & Macmurphy, the note in question, but the bequest is upon the condition "that he account or pay to my estate for the sum paid by me and interest, in fair cotton, at seventy-five cents per pound." This gave to J. L. Tompkins the right of election, and, as he has not and, we are given to understand, will not accept the bequest upon that condition, it necessarily fails, and the matter stands as if no such bequest had been made, and leaves the transaction as it originally stood, by which the testator was entitled to a claim against Tompkins & Macmurphy for the amount paid by him as their surety, and J. W. Tompkins was entitled to a similar claim against Tompkins & Macmurphy for the amount advanced by him for the purpose of taking up the note.

The next question to be considered is, whether the executors should be held liable for the uncollected notes and accounts due the testator at the time of his death. These assets were produced or accounted for by receipts of attorneys with whom they had been lodged for collection, and the evidence on the part of the executors is, that they tried to collect them, but were unable to do so. There is no evidence that any one of them could, by proper diligence, have been collected; and in the absence of such evidence, and under all the circumstances surrounding this case, the condition of the country, and the disasters resulting from the war, we do not see any sufficient ground to warrant the conclusion that these uncollected assets should be charged against the executors. As was held in *Pettus v. Clawson*, 4 Rich. Eq.

---

Opinion of the Court.

---

92, before an administrator should be charged with notes marked by the appraisers on the inventory as good, there should be some proof of their collection or of negligence in collecting ; and the same doctrine would apply to executors. To have required proof that the debtors had been sued to insolvency, or to have taken up each one and offered evidence as to his insolvency, would have involved an expense to the estate, which, in our judgment, would not have been justified.

The next question is as to the credits allowed for the payment of the judgment in favor of Jennings, Smith & Co. We see no error in the conclusion reached by the Circuit judge in reference to this matter. Even though there may have been technical informalities in the judgment, yet there is no evidence that the debt on which the judgment was recovered was not a valid claim against the estate, which has been extinguished by the executors, and they, therefore, should have credit for the amount paid by them. There does, however, seem to have been a mistake in crediting \$1,500 of this amount to the executor, S. S. Tompkins, which he admits to be an error ; and the Circuit judge has fallen into an error in sustaining plaintiffs' tenth exception to the referee's report *in toto*, while it should have been sustained only as to the \$1,500 erroneously credited to S. S. Tompkins, there being no evidence assailing any of the other credits allowed.

The next question is as to the mode of stating the accounts of the executors, it being alleged, in their behalf, that the referee erred in not deducting the payments made in each year before striking a balance to bear interest. The position taken by the executors is correct, and is fully sustained by the case of *Pettus v. Clawson*, 4 Rich. Eq. 92.

Our next inquiry is, whether there was any error in ascertaining the amounts chargeable to R. A. Tompkins and F. A. Tompkins on account of cotton received by them from the estate in 1865. R. A. Tompkins received two bales of cotton on July 24th, 1865, and sold them for \$215.16, in gold ; and F. A. Tompkins received two bales on November 24th, 1865, which he sold for \$443.90, in currency. In adjusting the accounts of the several parties, the referee converted the amount, for which

---

April Term, 1882.

---

R. A. Tompkins sold his two bales, into currency, by adding thereto the premium on gold, thus ascertaining the amounts chargeable to these parties by the same standard of value. In this we see no error. The other transactions between the parties, and the dealings of the executors with the estate, since the termination of the war, were, doubtless, made in currency, and not in gold; and, hence, it seems to us fair and equitable that the amounts with which R. A. Tompkins and F. A. Tompkins were chargeable for this cotton should be ascertained by the same standard of value.

Next, it is contended by the executors that they should not be charged with interest after the order of Chancellor Lesesne was made, in the case of *Clark v. Tompkins*, 1 S. C. 119, requiring them to account. If it had been made to appear that the executors had collected in the assets of the estate, and retained the same in their hands unemployed to meet any balance that might be ascertained on the accounting ordered, there would have been good ground to claim an exemption from liability for interest; but as this has not been made to appear, we do not see any ground upon which the position taken by the executors can be sustained.

The next question is, whether the executors were entitled to commissions after 1866, when they ceased to make annual returns to the ordinary. There is no doubt but that, by the terms of the act of 1789 (5 Stat. 112), an executor forfeited his right to commissions by a failure to make the returns required by that act (*Lay v. Lay*, 10 S. C. 208); but we have always understood the rule to be, that, when an executor or administrator is required to account before the Court of Equity, it was no longer necessary for him to make returns to the ordinary, inasmuch as a court of superior jurisdiction had assumed the duty of taking the account.

In this case it appears that these executors were required to account before the Court of Equity by an order passed in the case of *Clark v. Tompkins*, 1 S. C. 119, which case seems to have been heard in June, 1867, and although it does not distinctly appear when the bill was filed, it must, necessarily, have been in the latter part of 1866 or early in the year 1867. This,

---

Opinion of the Court.

---

we think, rendered it unnecessary for the executors to make annual returns to the ordinary after that time, and their failure to do so should not deprive them of their right to commissions. In addition to this, the act of 1789 was repealed on February 10th, 1872, by the adoption of the General Statutes, and the provision inserted therein, in lieu of the act of 1789, contains no clause by which an executor or administrator loses his right to commissions by a failure to make annual returns; and, therefore, in any event, the executors would be entitled to commissions since 1872. *Davidson v. Moore*, 14 S. C. 266.

In regard to the commissions allowed by the referee on the proceeds of the sale of the White House place, the Circuit judge seems to have fallen into an error of fact in saying that no money passed through the hands of the executor, for, as we understand the testimony, the proceeds of the sale did, practically, pass through the hands of the executor. We think, therefore, that the Circuit judge erred in sustaining the exception relating to this matter.

The only remaining error alleged is the omission to charge the assignees of H. W. Tompkins with the amount of an account due by him to James Tompkins & Son. This matter seems to have been overlooked, both by the referee and the Circuit judge. From the testimony before us, this seems to be a proper charge against the assignees, and the accounts should be rectified accordingly.

The judgment of this court is that the judgment of the Circuit Court be modified so as to conform to the principles herein announced, and that the case be remanded to that court for such further proceedings as may be necessary to carry into effect the views herein presented.

---

April Term, 1882.

---

## HOLMES &amp; DURHAM v. NATIONAL BANK OF WILMINGTON.

1. Action for breach of contract may be brought in the courts of this State against a national bank established in another State.
  2. There is nothing in the acts of Congress, relating to these banks, that prevents an attachment from issuing in such action before judgment.
- 

Before MACKEY, J., Charleston, April, 1881.

This was an action by Holmes & Durham against the First National Bank of Wilmington, in the State of North Carolina, commenced in October, 1879. The opinion states the case. The order of the Circuit judge was as follows:

National banking associations are the creatures of Congress, and are fiscal agents of the government. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383. They have such powers only as Congress thought proper to give to them, and are subject to such liabilities only as the national government has chosen to impose upon them. *Osborn v. Bank*, 9 Wheat. 738; *Commercial Bank v. Cleveland*, 10 Alb. L. J. 155. The evident intent of the acts creating them is to free them as much as possible from any embarrassment in the fulfillment of their functions. They have full power to contract as bodies corporate, and any contract may be enforced against them as well in the Circuit and District Courts of the United States as in the State, county and municipal courts, provided the action, suit or proceeding is brought in the place in which they are located.

The motive of this restriction is evident. If a national bank can be compelled to answer suit in a locality other than its place of business, absence of its officers, removal and detention of its books may be enforced, and its business operations, and, consequently, its utility, as one of the financial agents of the government, may be greatly hampered, if not entirely suspended. This construction of the act of Congress is sustained by courts



---

Opinion of the Court.

---

in this country of the highest rank and of unquestionable authority. *Crocker v. Marine National Bank*, 101 *Mass.* 240; *Chesapeake Bank v. First National Bank*, 40 *Md.* 269; *Cadle v. Tracy*, 11 *Blatch.* 101. The first ground of demurrer is sustained.

The second ground of demurrer is in the terms of the act of Congress, and it is also sustained. *Revised Statutes*, § 5242.

This case came up to be heard on demurrer to the complaint. After argument of counsel thereon and consideration thereof, it is ordered, adjudged and decreed that the demurrer be sustained, and the complaint be dismissed.

From this order the plaintiffs appealed upon exceptions raising the precise points decided by this court.

*Mr. T. M. Mordecai*, for appellant.

*Messrs. Simonton & Barker*, contra.

August 1st, 1882. The opinion of the court was delivered by

SIMPSON, C. J. The defendant, a national banking association in Wilmington, N. C., created under an act of Congress, has been made a party in this action by attachment of its funds in the hands of a national bank located in Charleston. The action proper is an action for an alleged breach of warranty in the sale of certain chattels and personalty by the defendant to the plaintiffs, and the attachment is an incident thereto.

The defendant demurred to the action upon two grounds: 1. That the court was without jurisdiction over the defendant, for, that, under the acts of Congress, it is liable only to suits and actions and proceedings brought against it in the State, county or city in which it is located, to wit, in the State of North Carolina, county of Brunswick and city of Wilmington, and nowhere else. 2. That it cannot be proceeded against by attachment, because, under the acts of Congress no attachment can issue against such corporations before final judgment in any suit, action or proceeding in any State, county or municipal court. Both of these grounds were sustained by the Circuit

---

April Term, 1882.

---

judge, who dismissed the complaint. The appeal involves the consideration of these grounds of demurrer.

It is conceded that if the defendant was an ordinary foreign corporation, that the objections made to the action could not be sustained. It is, however, contended that the defendant is a corporation created by act of Congress, and being, in some degree, a financial agent of the United States, that its powers, duties and liabilities are dependent upon the acts which gave it existence, and, under these acts, it cannot be sued except in the State where it is located. In view of this position, the first inquiry to be made is, what provisions have been made on this subject by Congress in the acts creating such associations.

The first act on the subject of national banks is the act of June 3d, 1864, styled "an act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." 13 *Stat. at L.* 99. In section 8 of this act, it was enacted that any association formed under this act shall, from the date of its organization, be a body corporate, having power to adopt a corporate seal, to make contracts, sue and be sued, complain and defend, in any court of law and equity, as freely as natural persons.

Section 52 of this act provides "that all transfers of the notes, bonds, bills of exchange and other evidences of debt owing to any association, or of deposit to its credit; all assignments of mortgages, sureties, or real estate, or of judgments, or decrees in its favor; all deposits of money, bullion or other valuable things for it use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." Section 57 provides "that suits, actions and proceedings against associations under this act, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court

---

Opinion of the Court.

---

in the county or city in which said association is located, having jurisdiction in similar cases.”

On March 3d, 1873, this act was amended, and especially section 57 above, by adding thereto the following proviso: “*And provided further*, that no attachment, injunction or execution shall be issued against such association or its property before final judgment in any such suit, action or proceeding in any State, county or municipal court.” 17 *Stat. at L.* 603.

On June 27th, 1866, Congress passed an act to provide for the revision and consolidation of the statute laws of the United States. 14 *Stat. at L.* 74. The commission appointed under this act, having reported, an act was passed December 1st, 1873, in conformity thereto, known as the Revised Statutes of the United States. In this general act, section 57 of the act of 1869, as amended by section 3 of the act of 1873, was left out as a whole, and section 3 was added to section 52, and made section 5242 of the Revised Statutes. Section 5596 of the Revised Statutes repealed all parts of acts not contained in said revision, and made the sections of the revision applicable thereto, to stand in the place of such repealed provisions. In 1875, an act was passed (18 *Stat. at L.* 300) correcting errors in the Revised Statutes, by which act section 57 of the act of 1864, left out in the previous consolidation, was restored and made a part of section 5198, which is now as follows: “That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district within which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.”

Thus it will be seen that when this action began, section 5198 above, and the proviso to section 57 of the act of 1864 inhibiting attachment before judgment, were of force, the substance of which, for a proper understanding of the question involved, will now be repeated. Section 5198 provides that these associations may be sued in any circuit, district or territorial court of the United States held within the district where the association is established, or in any State, county or municipal court in the

---

April Term, 1882.

---

county or city where it may be located, having jurisdiction in similar cases. And section 5242, which is the section rendering transfers of notes \* \* \* in contemplation of insolvency \* \* \* void by proviso attached thereto, inhibits attachments against these associations before judgment.

Now, the question is, whether, with these two provisions of force, this suit can be maintained in a State court not in the State where the bank is located. This will depend upon the construction which must be given to these two provisions. And, first, was it the intent of section 5198 to confer exclusive jurisdiction upon the courts therein named? and, secondly, does the proviso to section 5242 apply to all suits, or only to such suits as might arise in consequence of the attempted transfers of notes \* \* \* made in contemplation of insolvency, which are inhibited in that section, and to which section this proviso is attached?

The eighth section of the act declares that every banking association formed and organized in pursuance thereof, shall be a body corporate, possessed with the usual powers of corporations, to wit, to make contracts, to sue and be sued in any court of law and equity, as a natural person. If the act had stopped at this section, the question presented here could hardly have arisen, as, doubtless, the jurisdiction of the State courts would have been universally conceded when the action was properly brought in accordance with State laws. Did the subsequent section of the original act, section 57, now section 5198 of the Revised Statutes, conflict with section 8? It certainly did not in express terms. It is true that jurisdiction is conferred on the courts therein named, but not in language which expressly makes that jurisdiction exclusive. The language employed is, that suits, actions and proceedings against such associations *may* be had in said courts. The word "may" is a permissive word, not mandatory and not necessarily exclusive.

There being no express negation, then, of jurisdiction to the State courts generally, the next question is, has jurisdiction been taken away by implication? It has been held in some courts that the jurisdiction of a State court cannot be taken away by implication. *Teall v. Felton*, 1 N. Y. 537; *S. C.*, 2 Hill N. Y. 164; 26 Wend. 192. The subject-matter involved in this action

---

Opinion of the Court.

---

is an ordinary common law matter—breach of contract. The Circuit Court certainly had jurisdiction of this. The defendant is an artificial being, invested with the rights and privileges, and subject to the liabilities of a natural person, and, ordinarily, should stand before the courts as to jurisdiction over its person as other individuals occupying the same position. Our laws have made provision for making such beings parties to actions under certain conditions where their rights are involved, or their obligations are to be enforced, and in the absence of all express exclusion of jurisdiction by the acts of Congress creating them, the implication should be very strong to divest the State courts of their usual functions in such cases. It should be a necessary implication.

The argument is, that the enumeration of certain courts in the act was wholly useless, unless a restriction was intended; that these courts would have had jurisdiction without this special grant in common with other courts, and, therefore, the only purpose of conferring it expressly must have been to confer it exclusively. This argument has much force, but it is not conclusive. The implication arising from it does not appear to be of that strong controlling character sufficient to paralyze the arm of the State courts, and to render these associations free from State control, enabling them to delay and defraud creditors, and, as was said by Church, C. J., “involving an amount of expense and injustice which we cannot attribute to the intention of the law-making power.”

The decisions in other States are not uniform on this question. The two most prominent cases in which the question has been discussed, are the cases of *Crocker et al. v. Marine National Bank of the City of New York*, 101 Mass. 240, and the case of *Cooke v. State National Bank of Boston*, 52 N. Y. 97. These cases reached directly opposite conclusions; Gray, J., in Massachusetts, holding that, by force of the act of Congress, such associations could be sued only in the county or city where the association was established, and Church, C. J., in New York, that an intent to take away jurisdiction from the State courts should not be deduced from the doubtful and ambiguous language employed in the act of Congress. The question has never

---

April Term, 1882.

---

been made squarely in the Supreme Court of the United States. The nearest approach to it was in the case of *Casey v. Adams*, 12 Otto 66, but the decision there is not strictly in point, and the respondent's counsel admits frankly that the decisions in the other States are in conflict.

In the absence of any case in our own courts, of direct decisions in the Supreme Court of the United States, and in the conflict between the cases in the courts of the States, the respondent, falling back upon general principles, takes the position that these associations are financial agents of the government, established by act of Congress for that purpose; that, as such, they are exempt from all control of the State authorities, except so far as may be permitted by Congress. He refers to *Van Allen v. The Assessors*, 3 Wall. 589, in which Chase, C. J., the author of the system, discussed fully the character of these banks and the purpose of their creation.

No doubt they were intended as financial agents of the government, and, being created by act of Congress, they should be entirely free from the legislation of the States; that is, the States could not add to or diminish their powers and duties by adverse legislation or cripple them in any way in the exercise of their legitimate functions; but it does not follow that they are to be regarded as wholly exempt in every respect from responsibility to State laws. This would be giving them a much higher position than any other citizen of the United States. This is not necessary to their usefulness or value as financial agents of the government, and they are not entitled to that position. They have power to contract in the several States, to sue in the State courts, and there can be no reason why they should be exempt from State process when they breach their contracts. There should be reciprocity. In our opinion, the demurrer upon the first ground should have been overruled.

The proviso to section 5242 prohibiting attachment proceedings against these associations before judgment rendered, we think, applies to the suits arising out of the matters referred to in that section. The purpose of this proviso being to prevent discrimination between creditors in cases of insolvency or bankruptcy, and this not being a case arising under that section, there

---

Statement of the Case.

---

was no foundation for the demurrer on that ground. *Robinson v. National Bank*, 81 N. Y. 392. The question of the power of Congress to strip the State courts of jurisdiction in such cases, involving, as in this case, simply a common law cause of action, is not necessarily involved, and, therefore, we have not considered it.

It is the judgment of this court that the judgment of the Circuit Court be reversed and the case be remanded for a new trial.

---

EX PARTE BENSON & CO.

GIBBES v. GREENVILLE AND COLUMBIA RAILROAD COMPANY.

STATE, *EX RELATIONE* ATTORNEY-GENERAL, v. SAME.

1. The common-law rule seems to be that common carriers shall transport goods at reasonable rates, but this rule does not require the same rate of compensation to be charged alike to all.
2. Independent of charter and statute restrictions, corporations stand upon the same footing as other persons invested with powers of contracting, and their contracts depend upon the same principles that govern contracts between natural persons.
3. A contract of a railroad company to pay a rebate upon all cotton shipped over their road by certain cotton buyers is not inequitable or against public policy; and, after the shipment made, is binding on the company and its creditors.
4. And the contract having been made by the superintendent while the road was in the hands of a receiver, the claim for rebate under such contract should be paid out of the receiver's fund.
5. *In re Fifty-four First Mortgage Bonds*, 15 S. C. 304, qualified by MCGOWAN, A. J.

---

Before FRASER, J., Richland, December, 1881.

Petition by E. B. Benson & Co. *in re* Gibbes v. Greenville and Columbia Railroad Company, and the State, *ex relatione* the Attorney-General, v. same. The petition was based upon a contract made by letter, and which is fully stated in the opinion.

---

April Term, 1882.

---

The Circuit decree, after a statement of the facts repeated in the opinion, was as follows :

Under orders, in such cases, receivers are sometimes allowed to do certain specific acts ; but, in this case, there is no limit, except, as I construe the order, that which is furnished by a wise discretion, subject to the order of this court. No unlimited power was ever claimed, and none was conferred by the order. I take it that every contract was made subject to the supervision of the court, and that no wrong is done even at this late day, if the approval of the court is withheld from a contract which has in it no substantial merit. The authority in *High Rec.* 392, and *Jones Railr. Sec.*, § 498, rest on the same case, and I find no other for allowing a payment of *rebates* in a receiver's account. It is an unfair discrimination amongst shippers, and I do not think proper, especially when made by an appointee of the court. I cannot concur in the opinion expressed by the witness that such contracts are necessary. The interest of a great common carrier, like a railroad company, is best subserved by fair and equal rates of freight, which are open to all. The question is a new one in this State, and I am not willing, in this case, under a loose construction of Judge Melton's order, to give the approval of the court to a contract which I think is against public policy, and could not have been of any real benefit to the property under the control of the court, and has no equity. The exceptions are, therefore, sustained, and it is, therefore, *ordered and adjudged*, that the petition be dismissed with costs.

The exceptions of petitioners raise the questions of the validity of the contract and the right to payment out of the receiver's fund.

*Messrs. J. S. Muller, J. T. Sloan*, for appellants.

*Mr. James Conner*, contra ; cited 99 *U. S.* 252 ; 52 *N. H.* 448 ; 62 *Pa.* 230 ; 7 *Vr.* 407.

August 8th, 1882. The opinion of the court was delivered by



---

Opinion of the Court.

---

MR. CHIEF JUSTICE SIMPSON. The appellants, Benson & Co., filed a petition in the court below *in re* the above stated causes, praying payment of a certain claim for \$668 as rebate freight on six hundred and sixty-eight bales of cotton shipped over the Greenville and Columbia railroad by the petitioners, from Anderson Court House, during the cotton season of 1877-78. This claim was founded upon an alleged contract between the petitioners and the president and directors of said railroad company acting as receivers under the order of June 18th, 1872, known as Judge Melton's order, and the petition prayed payment out of the "receivers' fund." The contract relied on by the petitioners is not denied, nor is it denied that the petitioners have fully performed their part thereof.

The contract is fully set out in the petition. In substance, it is as follows: The petitioners were engaged in buying cotton. They purchased largely in Hartwell, Georgia, and, with the view to induce them to ship their cotton, bought at that place, over the Greenville railroad instead of down the Savannah river, Thomas Dodamead, the then superintendent of the said road, proposed that if they would ship all cotton purchased during the season of 1877-78, in Hartwell, by way of Anderson, S. C., over said road to Charleston or Augusta, they, the said president and directors, would transport said cotton at the regular rates, the freight to be paid at the regular rates by the consignees, with the understanding, however, that the petitioners should have refunded to them, at the close of the season, the sum of one dollar per bale so shipped to either point above mentioned.

This proposition was accepted by the petitioners, and a contract made accordingly, and, as has been stated, was acted upon by petitioners to the extent of shipping the six hundred and sixty-eight bales mentioned above over the road during the cotton season specified. At the end of the season, the agent at Anderson, C. H., made out a statement of the number of bales shipped under the contract with Mr. Dodamead, the superintendent, with vouchers for the amount due, who approved the same in regular form for payment and forwarded it to the treasurer's office to be placed to the credit of Benson & Co. The claim,

---

April Term, 1882.

---

however, was not paid, because, as Mr. Dodamead says: "The funds on hand were not sufficient, every available dollar being used to pay interest on debt of road instead of being applied to current expenses."

Mr. Dodamead further testified in this connection, that such a debt as this one, to wit, rebate on interchange of freights, should have a preference to all other debts, as they are essential to the successful competition of railroads over freights. He said that they were competing with the Savannah river transportation, and the benefit of this particular transaction to the business of the road was, that it brought cotton to the road which would not have otherwise come; besides that, the persons who hauled their cotton, also bought their supplies there, and the road got the benefit, not only of the freight in the cotton down, but also on the return supplies.

In the latter part of the year 1878, the railroad property passed out of the hands of the president and directors, heretofore receivers, into the possession of a second receiver appointed under an order of Judge Pressley, made to that end, and, the claim of the petitioners still remaining unpaid and refused, this petition was filed on November 2d, 1881. At the December Term of the court for Richland county, the master to whom the petition had been referred to take testimony touching the claim, and to report thereon to the court, submitted his report, embracing the facts herein above stated, with a recommendation that the claim be allowed, and paid out of the fund known as the "receiver's fund."

At the hearing below, Judge Fraser, upon exceptions to the master's report, dismissed the petition with costs, holding, substantially, that the contract was without equity, was against public policy, could not have been for the real benefit of the company, was an unfair discrimination between shippers, and was not proper, especially when made by an appointee of the court. From this decree of Judge Fraser, the petitioners have appealed, and the appeal, though founded upon several exceptions, really brings up but a single question, to wit: Are the petitioners entitled to payment out of the receiver's fund in priority to mortgage bondholders?

## Opinion of the Court.

It is admitted that this contract was made prior to the act of 1878 (16 Stat. 784), regulating the matter of freights and charges on railroads and preventing rebates. It will be also conceded that there is nothing in the charter of this company which forbade such a contract. In the absence of statutory regulations then controlling the action of the company, it being a common carrier, we must look to the common law for the principles which are to govern in such a case.

What does the common law say as to questions like this? The leading principle of the common law, as applicable to common carriers, is that they are bound to carry for all, and for a reasonable remuneration from each. In *Johnson v. Pensacola and Perdido Railroad Co.*, 16 Fla. 623, Mr. Justice Westcott, in discussing a similar question to the one involved here, has collected many authorities bearing upon this point, and the conclusion which he reaches is: "That as against a common or public carrier, every person has the same right; that in all cases where his common duty controls, he cannot refuse A. and accommodate B.; that all the entire public have the right to the same carriage for a reasonable price at a reasonable charge for the service performed, and the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is, that for services performed, he shall charge no more than a reasonable sum to him."

This conclusion is sustained by numerous authorities, both English and American. *Peek v. North Staffordshire Railroad Company*, 10 H. L. 511; *Bastard v. Bastard*, 2 Show. 82; *Harris v. Packard*, 3 Taunt. 264; *Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story 35; 4 Otto 155; 1 Chitty Cont. 684. In *Fitchburg Railroad Company v. Gage*, 12 Gray 393, the Supreme Court of Massachusetts held that a "railroad corporation is not obliged, as a common carrier, to transport goods and merchandise for all persons at the same rate," the common law rule being that equal justice shall be done to all parties. "But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge in each particular case of service a reasonable

---

April Term, 1882.

---

compensation and no more." If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint.

In the eighth edition of *Story Bailm.*, § 508, it is stated that "at common law, a common carrier of goods is not under obligation to treat all customers equally. He is bound to accept and carry for all, upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable, nothing more. There is nothing in the common law to hinder a common carrier from carrying for favored individuals at an unreasonably low rate, or even for gratis."

As extracted from these authorities, and many others which might be cited, the extent of the common law rule seems to be; not that carriers shall transport for all parties at the same rate of compensation, otherwise their contracts are illegal and void, but that they shall transport at reasonable rates to all. A difference in charge does not *per se* invalidate the contract as inequitable and against public policy; but to have this effect, there must be an element of unreasonableness in the charge itself, as applied to the services rendered, between the parties to the contract and without comparison to the charges against others. ✓

Independent of statutes and provisions in their charters restricting corporations within certain limits, they stand in the community as other individuals invested with the power to contract and be contracted with, and the validity of their contracts depends upon the same principles which govern in contracts between natural persons. It is too vague to say, in general terms, that the contract is inequitable and against public policy, and, therefore, not enforceable. To be void on such grounds, it must run counter to some known principle of equity or contravene some well-established doctrine of public policy forbidding it. ✓

We do not know that this contract was obnoxious to any of these objections; nor, in the face of the testimony of the experienced superintendent who gave it, can we say that it was unnecessary. The cotton which he brought to the head of his road at Anderson, C. H., was grown in the State of Georgia, at a distance from Anderson. The Savannah river, running be-

---

Opinion of the Court.

---

tween Anderson and Hartwell, was its natural outlet to market, and, no doubt, afforded cheaper transportation. With these obstacles in the way, it required some inducement to be held out so as to bring this cotton to the Greenville road. And so long as the charges against others were not unreasonable, and in no way increased by the rebate offered to it, what ground is there for the courts to interfere? It is the province of the court to enforce contracts, not to destroy them.

But the main question in the case is, should this claim be paid out of the "receiver's fund." In the present unsettled state of the law as to what expenses may be properly chargeable to income in the hands of a receiver operating a railroad or other enterprise taken possession of by the court at the instance of mortgage creditors, it is difficult to lay down any inflexible rule by which every claim may be tested and determined. In the early history of such cases, these charges were at first confined to such expenses as were necessary to the preservation of the property. But the doctrine has been progressive, gradually enlarging until now many items of expense which, at first, would have been excluded, would be allowed, and justly so. If creditors, through the aid of the courts, will oust corporations of their property, take possession and operate the enterprise preparatory to an ultimate sale, through their agents, and for their own benefit, all the necessary and incidental expenses should certainly be paid, and the doubt in my mind is, not whether they should be chargeable to the earnings alone, but whether the corpus also should not be liable.

But to recur: What character of expenses will be allowed? It is said in *Jones Railr. Sec.*, § 498, "That all outlays of a receiver of a railroad, made in good faith, in the ordinary course of the management and operation of it, or so made with the view to advance and promote the business of the road and make it profitable and successful, are fairly within the limit of discretion necessarily allowed him. Thus," he continues, "payments made by him as *rebatement of freights* to shippers in order to secure custom and increase the business of the road, being in the nature of drawbacks, such as are usual with transportation com-

---

April Term, 1882.

---

panies, are properly within his discretion," referring to *Cowdrey v. Railroad Company*, 1 Wood 331.

In *High Rec.*, we find the following (section 392): "The duties of the receiver of a railway entrusted with the management and operation of the road, being very different from, and far more responsible than those of a passive receiver, appointed merely to collect and hold money, a somewhat wider discretion is allowed him in the matter of expenditures necessary to operate the road. And it may be said in general, that all outlays made by him, in good faith, in the ordinary course of the business of the road, with the view to advance and promote its interests, and to render it profitable and successful, may be allowed in passing his accounts; such outlays may include, not only keeping the road and its buildings and rolling stock in repair, but also procuring such additional accommodations and stock as the necessities of the business may demand, always referring to the court or master for advice when any considerable outlay is required. Thus, the charge for *rebate on freights* for horses and wagons, for the delivery of freight, for drayages and wharfage, for office room, for advertising the accommodations of the road, and for interest paid a bank for loans of money, have been allowed."

It is true these authorities are not, in themselves, binding upon this court; but they come from distinguished text writers, and are worthy of consideration, especially as the principles announced are founded in good sense, and rest upon high equity. At all events, as was said by Mr. Justice Bradley, in the case of *Cowdrey v. The Railroad Company*, *supra*, "Whatever objection to these rebatements might be made by the State, or by the planters and others who did not obtain like favorable terms, it does not lie in the mouths of the creditors, who reap positive benefits from the arrangements, to complain of it." And especially is this remark pertinent in this case, when it is remembered that the receivers here were appointed at the instance of the creditors under an order which invested them with almost unlimited power and authority, the exercise of which, in its widest range, they stood by and permitted, without objection or protest, for a period of five or six years.

In the case of *Ex parte Brown & Wife*, 15 S. C. 532, this

---

Opinion of the Court.

---

court held that the order of June 18th, 1872, not only constituted the president and directors receivers in the general sense, but conferred upon them "sweeping powers to conduct and carry on the business of the company." In the *Fifty-four Bond Case*, 15 S. C. 304, pronounced before *Ex parte Brown*, the same construction was given to this order. The authority of High and Jones may not be controlling, but the two cases referred to above are from this court, and we cannot disregard them. The principles held in those cases, and under which the claims set up therein were allowed, vindicate fully the claim of the petitioners here, both in point of authority and in the substantial justice which underlies it. We think the Circuit judge was in error in dismissing the petition.

It is the judgment of this court that the Circuit decree be reversed and that the case be remanded, so that the amount found due by the master may be decreed to the petitioners to be paid out of the "receiver's fund."

MR. JUSTICE MCGOWAN. I concur in the result; but as the reference to the *Fifty-four Bond Case* may be construed as approving all that is there said, I think it proper, in order to prevent confusion hereafter, to say that I do not agree with some things said in that opinion, especially the statement that "large discretion is allowed him (the receiver) in the financial manipulation of the assets." In my view, a receiver is not the agent of the company so as to bind it by his contracts, but simply the officer of the court. His new administration is separate and distinct from that of the company, and, without the express orders of the court, he has no right to touch the general finances of the company, but is limited to the income which arises from operating the road while under his control.

Judgment reversed.

---

April Term, 1882.

---

## PEARSON v. CARLTON.

## SAME v. FOWLER.

An intestate died in March, 1862. In July, a bill was filed for partition of his lands, and, by order passed in September, the widow was allotted one-third of the land, and the remainder was ordered to be sold; and the sale was made in October. An infant heir, A., was not a party to the proceedings; an heir, B., who had been made a party, died in August intestate and unmarried; and a child, C., was born to the first intestate after the sale. The purchase-money was paid and became worthless before distribution. *Held*—

1. That A. was not bound by any of these proceedings, and was, therefore, here entitled to have partition of the lands purchased so as to obtain his share thereof as a distributee of the intestate, and also as a distributee of B.
2. That the allotment to the widow was not binding upon A. as a distributee of the intestate and of B.
3. That the purchaser must account to A. for his share of the rents and profits.
4. That C. was entitled to the same rights as A.
5. That there was no error in requiring the widow to pay her own costs in this action.
6. A child born alive after the death of an intestate father is one of the children left by such father, and, as such, is capable of inheriting under our statute of distributions.
7. That such child is not bound by an allotment or sale in partition made before its birth, nor is it remitted to the proceeds of a sale so made.

---

Before HUDSON, J., Spartanburg, April, 1881.

These were two actions commenced by James T. Pearson on March 7th, 1878; one against Elizabeth Carlton, Anna Waddill and others, distributees of James Carlton, deceased, and the other against J. M. Fowler, Sanford Brockman and others, the same defendants as in the other case, except Elizabeth Carlton. The opinion states the facts of the case.

The Circuit decree, after a statement of facts, was as follows:

In regard to the unborn infant, Anna Waddill, we feel much perplexed. She was no party to that bill, nor could she be made



## Circuit Decree.

such; and yet she was then heir to her father, and entitled, upon birth, to a share of the estate. It is passing strange that, in this hasty partition, the condition of the widow was not noticed, and that a living heir, James T. Pearson, was overlooked. There would be no difficulty nor hardship in the matter if the land had been allotted to the other heirs, and was still in their hands. They could be decreed to contribute to this posthumous child out of their shares until she be made equal. Even if the fund were on hand undistributed she could get her share after a re-adjustment. But the fund, though still in court, or in the hands of the commissioner, and undivided, is utterly worthless. She had no voice in the suit by which this was brought about, and should not suffer from this calamity which the other heirs are called on to bear.

We feel constrained to hold that she is still entitled to her share of her father's land, although it has, in part, passed into the hands of a *bona fide* purchaser. The same rule, of course, must apply to the plaintiff, James T. Pearson, who was then *in esse*, but not a party. But how far can these two children disturb their mother's share of land, allotted to her as and for her thirds? The widow's share is fixed, and is not varied or affected by the number of children; be the same few or many, she takes under the statute her one-third in value of the land. That one-third has been duly allotted to her, and she has been for nearly twenty years in the quiet possession thereof. We do not think that this child and grandchild can be allowed to disturb her possession, unless they can show that the allotment to her was excessive. If this can be successfully done, then out of the excess they should be allowed to take their shares respectively; and of the sum of money which she was ordered to pay for equality of partition, and which she has not paid, they must have their shares.

Of the lands purchased by J. M. Fowler, the said Anna Waddill and James T. Pearson are entitled to demand partition, and likewise an accounting for rents and profits. He is entitled to all said lands, and to the use and occupation, rents and profits thereof, except such portion of land and rents or rental as shall be ascertained to belong to these claimants. Whether he will

---

April Term, 1882.

---

have any rents and profits or rental to account for will depend upon whether he has derived rents and profits from more than his share of the land, or whether he has actually used more than his share thereof. The correct rule by which he will be held to account is laid down in the case of *Jones v. Massey*, 14 S. C. 292.

Fowler (and Brockman who has bought of him) will be held to account only for the rents, issues and profits, use and rental of whatever portion of the land, over and above Fowler's share, which has actually yielded rents and profits or rental income. Against the claims of James T. Pearson and Anna Waddill to a part of this land, and the rents, issues and profits thereof, the defendants, Fowler and Brockman, are entitled to a fair and reasonable offset for the enhancement of the value of the land by reason of betterments made and erected under the honest belief that their titles were good against all the heirs-at-law of James Carlton, deceased. These offsets can be adjusted either by a separate action under the statute, or may be adjusted in this action in the partition of the land, and accounting for rents and profits. It is therefore ordered, adjudged and decreed—

1. That Mary R. Godfrey and William Godfrey, her husband; Sarah Pearson and her husband, Green L. Pearson; and Francis Wood and Thomas Wood, her husband, are entitled to no relief in this action, the said wives being bound by the original partition in 1862.

2. That a writ in partition do issue, directed to five commissioners, selected according to the practice of this court, commanding them, or a majority of them, to make partition of the lands of James Carlton, deceased, described in the pleadings as being in the possession of J. M. Fowler, (and under him, in part possessed by Sanford Brockman,) so as to allot to James T. Pearson, the plaintiff herein, and Anna Waddill, one of the defendants herein, their respective shares thereof as heirs-at-law of James Carlton, deceased, and of his son, John Carlton, deceased, and the balance to J. M. Fowler, and Sanford Brockman, who claims a part under said Fowler.

3. That the same commissioners do view the tract allotted to

---

Opinion of the Court.

---

the widow, Elizabeth Carlton, and ascertain whether the same be more than her one-third in value of the lands of James Carlton, of which he died seized, and \$23.90 in excess, as was reported by the commissioners in partition in 1862. That they, in making this estimate, have reference to the value of said lands in 1862, at the date of the division, and make due return of their action in the premises to the next term of this court.

4. That Elizabeth Carlton do pay the said \$23.90 and interest into this court, and, that when paid in, the said J. T. Pearson and Anna Waddill do receive their respective shares of the same.

5. That it be referred to C. P. Wofford, Esq., to take an account of the rents, issues and profits, or rentals of the lands in the possession of J. M. Fowler and Sanford Brockman, according to the principles of this decree; and also of the betterments and improvements made and erected thereon by the said Fowler and Brockman, and that he do adjust and balance the accounts and offsets, and make report of his actings in the premises, with leave to report special matter.

It is further ordered that the parties herein do pay their own costs, respectively.

Exceptions were filed to this decree and appeal taken to this court.

*Messrs. Bobo & Carlisle*, for appellants.

*Messrs. J. S. R. Thomson, R. K. Carson*, contra.

August 8th, 1882. The opinion of the court was delivered by

MR. JUSTICE McIVER. James Carlton died intestate in March, 1862, and in July, 1862, a bill was filed in the Court of Equity by certain of his heirs, alleging that the personal estate in the hands of the administrator was sufficient for the payment of his debts, and praying for partition of his real estate. The administrator answered, saying that he had assets sufficient for the payment of the debts, and consenting to the partition. To this bill the plaintiff, who was then an infant of tender years, and the only child of a deceased daughter of the intestate, was not made a

---

April Term, 1882.

---

party. John Carlton, a son of the intestate, who was a party to the bill, died intestate in August, 1862, leaving, as his heirs-at-law, the other parties to the bill and the plaintiff, James T. Pearson, as well as the defendant, Anna Waddill, who also claims to be one of his heirs.

No notice was taken of the death of John Carlton in the proceedings then pending for partition, and on September 6th, 1862, an order for a writ of partition to issue was made. In pursuance of this order the writ was issued, to which the commissioners made a return, allotting a tract of land to the defendant, Elizabeth Carlton, the widow of the intestate, as her one-third of the real estate, which, exceeding in value her share by the sum of \$23.90, she was directed to pay that amount (to the other heirs, we presume, though it is not stated to whom,) for the purpose of equalizing the partition. The remainder of the land was recommended to be sold, and, accordingly, on the same day, to wit, September 6th, 1862, an order for the sale was made, and in pursuance of this order the balance of the land was sold on October 6th, 1862. At this sale the defendant, Fowler, became the purchaser, complied with the terms of sale, took titles, went into possession, and, subsequently, conveyed a portion of the land to his co-defendant, Brockman. Three days after this sale the widow of the intestate gave birth to a child, the defendant, Anna Waddill, who claims, as a posthumous child of the intestate, to be one of his heirs, and, as such, entitled to a share of his estate.

These actions were brought by the plaintiff; one for the purpose of obtaining his portion of the tract of land allotted to the widow, and the other for his portion of the land bought by the defendant, Fowler, at the sale for partition, and for rents and profits. The defendant, Anna Waddill, in her answer, sets up a claim for her share in the said lands as one of the heirs of the intestate. The Circuit judge held that, so far as the land allotted to the widow was concerned, she could not be disturbed in the possession of it, unless, upon an inquiry which he directed, it should be ascertained that it exceeded in value her share of the estate, in which event, the plaintiff and the defendant, Anna Waddill, would be entitled to their shares of such excess, as well as to

---

Opinion of the Court.

---

their shares of the amount which the widow was directed to pay for the purpose of equalizing the partition. He also held that these parties were entitled to their shares of the land bought by defendant, Fowler, at the sale for partition, and now claimed by him and his co-defendant, Brockman; and that these defendants should account for the rents and profits of so much of the land over and above their share as actually yielded rents and profits, subject to a deduction for improvements made by them. It was also adjudged that the plaintiff and the defendant, Anna Waddill, were also entitled to their shares of the share of John Carlton, who died pending the proceeding for partition. Finally, it was decreed that the parties herein pay their own costs respectively.

From this judgment the defendants, Fowler, Brockman and Mrs. Carlton, appeal on the following grounds: Because the Circuit judge erred—1. In refusing to dismiss the complaint in the case first above stated. 2. In requiring the defendant, Elizabeth Carlton, to pay her own costs. 3. In requiring a re-assessment of the land assigned to said defendant, Elizabeth Carlton, as her distributive share of the real estate of her deceased husband. 4. In holding that the plaintiff and Anna Waddill were entitled to any share in the premises so assigned. 5. In holding that the defendants, J. M. Fowler and Sanford Brockman, should account for the rents and profits of the land purchased by the said Fowler at the partition sale of the real estate of James Carlton, deceased. 6. In holding that the defendant, Anna Waddill, is entitled to any share in the land purchased by the said Fowler as aforesaid. 7. In holding that the defendants, J. M. Fowler, Sanford Brockman and Elizabeth Carlton, were bound to account to the plaintiff and Anna Waddill for the interest of the latter in the share of John Carlton, deceased, in said premises. 8. In holding that the premises described in the complaint were subject to partition.

We propose, first, to consider the claims of the plaintiff. We do not see how it can be questioned that he has a right to have partition of the lands in question. He was confessedly one of the heirs of the intestate, James Carlton, and he was not made a party to the proceedings for partition—was an infant at the time,

---

April Term, 1882.

---

and has only recently attained the age of twenty-one years. He was, therefore, not bound by those proceedings, and his rights stand as if no such proceedings had ever been instituted; for if there is anything settled, it is that judgments bind only the parties to the proceedings in which they are obtained and their privies. Indeed, it does not seem to be seriously denied that he has a right to demand partition of the land purchased by the defendant, Fowler, and to have his share thereof set apart to him.

It is contended, however, that inasmuch as the share of the widow would have been one-third anyhow, no matter what may have been the number of the children, and inasmuch as only one-third of the real estate was allotted to her, that the plaintiff has no cause of complaint against her, as that amount would have been allotted to her even if the plaintiff had been a party to the proceedings for partition. But it must be remembered that persons interested in the subject-matter of litigation are required to be made parties for the purpose of enabling them to be heard at every step taken therein, and as this plaintiff has not yet had an opportunity of being heard as to the propriety of the partition which has been made, he still has that right. It may be that, through collusion, mistake or negligence of the other parties, the land allotted to the widow exceeded her share, or that the partition was open to objection upon some other ground, and the plaintiff undoubtedly has a right to have the whole matter inquired into; and most unquestionably he has a right to demand from the widow his portion of the amount which she was directed to pay for the purpose of equalizing the partition. This being so, it follows, necessarily, that there was no error in requiring the defendant, Elizabeth Carlton, to pay her own costs; on the contrary, the provision of the Circuit decree, in that respect, is, perhaps, more favorable to her than she would have had a right to demand.

The next inquiry is, whether there was any error in requiring the defendants, Fowler and Brockman, to account for rents and profits. Although there seems to be some conflict of decision elsewhere as to the liability of one tenant in common to account to his co-tenants for rents and profits of the premises held in

---

Opinion of the Court.

---

common, yet, in this State, the rule is too well settled to admit of controversy, that, when one tenant in common occupies and uses more than his share of the common property, he is liable to account to his co-tenant for the rents and profits of so much of the common property as he has occupied and used in excess of his share. *Scaife v. Thomson*, 15 S. C. 338, and the authorities therein cited. The plaintiff, never having been divested of the title to his share in the land bought by Fowler at the sale for partition, was, unquestionably, tenant in common, and, as such, entitled to an account for rents and profits as directed by the Circuit judge.

Next, as to the plaintiff's claim for his portion of the share of his deceased uncle, John Carlton, in the intestate's estate. John Carlton was originally one of the parties to the proceeding for partition, and had he lived until the decree for partition and sale thereunder was made, his interest would undoubtedly have passed to the purchaser at such sale. But, pending that proceeding, and before any decree for partition, he died intestate, leaving the plaintiff, who was not a party to such proceeding, as one of his heirs-at-law, and no notice whatever was taken of his death in the further conduct of that case. Of course, when John Carlton died intestate, his interest in the real estate of his deceased father at once descended to and became vested in his heirs-at-law, of whom the plaintiff was one, and any subsequent sale of the estate, under a proceeding to which the plaintiff was not a party, could no more divest the interest of the plaintiff in the share of his deceased uncle than it could divest his interest in the estate of his grandfather. It is clear, therefore, that the plaintiff was entitled to claim, not only his share as one of the heirs of his deceased grandfather, but also his share as one of the heirs of his deceased uncle, John Carlton; and there was no error in the judgment below in this respect.

Finally we are to consider what is the only real question in the case, the claim of the defendant, Anna Waddill, the posthumous child of the intestate. Under a rule which was rigidly observed by some of the former chancellors of this State, this question could never have arisen; for, according to that rule, a bill for partition of the real estate of an intestate would not

---

April Term, 1882.

---

have been entertained until after the lapse of twelve months from the death of such intestate. If this wholesome rule had been observed when the application was made for the partition of this estate, the parties would, probably, have been saved the expense of this litigation. But although this was a rule governing the practice of some, at least, of the former chancellors, on circuit, yet it was not based upon any statutory provision like that forbidding the distribution of the personal estate of an intestate "till after one year be fully expired after the intestate's death," (2 *Stat* 524; *Gen. Stat.* 455,) nor did it have the sanction of any decision of a court of last resort, so far as we know. We cannot, therefore, undertake to say that the failure to observe this salutary rule invalidated the partition now under consideration.

The question, therefore, of the right of a posthumous child to inherit from his deceased father, is, so far as we are informed, for the first time distinctly presented for decision in this State. The rule, elsewhere, seems to be well settled, that a posthumous child inherits from his deceased father just as if he had been born in the lifetime of such father, and had survived him. In 4 *Kent Com.* 412, it is said: "Posthumous children inherit, in all cases, in like manner as if they were born in the lifetime of the intestate and had survived him. This is the universal rule in this country. It is equally the acknowledged principle in the English law; and for all the beneficial purposes of heirship, a child in *ventre sa mere* is considered as absolutely born." So in 3 *Washb. Real Prop.*, bk. 3, ch. I., § 2, p. 16, it is said: "Posthumous children inherit in the same manner as if they had been born in the lifetime of their father, and were surviving heirs; and this doctrine is universally adopted in the United States. And this relates back to the conception of the child, if it is born alive."

In *Wallis v. Hodson*, 2 *Atk.* 115, the intestate died in December, 1724, "and, at his death, left issue, Towers Wallis, his only child, an infant, who died within a week after his death, and the defendant, Elizabeth, his widow, *enceinte* with the plaintiff, who was born on May 22d following;" and the question was whether the posthumous child could take any portion of the



## Opinion of the Court.

deceased son's estate. *Held*, that she could; Lord Hardwick saying: "The principal reason I go upon in the question is, that the plaintiff was in *ventre sa mere* at the time of her brother's death, and, consequently, a person *in rerum natura*, so that both by the rules of the common and civil law, she was, to all intents and purposes, a child, as much as if born in the father's lifetime." In *Lancashire v. Lancashire*, 5 T. R. 49, John Lancashire, being unmarried, made his will, and, subsequently, married and died; leaving his wife pregnant, who, subsequently, gave birth to a child, and the question was whether this operated as a revocation of the will. The general proposition that marriage and the birth of issue would operate as a revocation being conceded, the only question considered was, "whether a posthumous child is considered in the same situation as one born during the parent's life, and the conclusion reached was that there was no distinction. See, also, *Thellusson v. Woodford*, 4 Ves. 322.

An argument in support of a contrary view has been suggested, drawn from the word "leave" in our statute of distributions, and it has been contended that as our statute provides only for those whom the intestate *leaves* at his death, an unborn child of the intestate cannot be said to be one of those *left* by him at his death, and, consequently, cannot inherit under the statute. If, however, as we have seen, there is no distinction, in law, between a posthumous child and one born during the father's lifetime, so far as the right to inherit is concerned, this argument loses its force. But, in addition to this, it has been repeatedly decided that a devise to the children of one "living at his death" embraces a posthumous child. *Clarke v. Blake*, 2 Ves. Jr. 673, and the cases therein cited; *Jenkins v. Freyer*, 4 Paige 52; *Steadfast v. Nicoll*, 3 Johns. (N. Y.) Cas. 18.

So in *Burdet v. Hopegood*, 1 P. Wm. 486, the testator devised the premises, "in case he should leave no son at the time of his death," to the defendant, Hopegood, and died, leaving his wife pregnant, who afterwards gave birth to a son, the plaintiff, and it was held that the plaintiff was entitled to the devised premises, the contingency upon which the estate was to go over to the defendant not having happened; the testator did *leave* a son,

---

April Term, 1882.

---

although he was not born at the time of his father's death. See, also, *Bedon v. Bedon*, 2 *Bailey* 231, where the same view seems to have been taken as a matter of course, the question not being discussed by the court. It seems to us, therefore, that a posthumous child, who is afterwards born alive, must be regarded as one of the children left by his deceased father, and, as such, capable of inheriting under our statute.

It may be contended, however, that though a posthumous child is an heir of his deceased father, and, as such, entitled to a portion of his estate, yet, that, as his rights do not attach until his birth, he must take his portion of the estate in the condition in which it is found at his birth; and where, as in this case, the real estate of his deceased father has, before his birth, been converted into money or bonds by a sale thereof, his claim must be confined to his share of such money or bonds, and that he cannot claim a share of the land in the hands of a purchaser.

We have found one case, which, at first view, seems to support this proposition. *Knotts v. Stearns*, 91 *U. S.* 638. In that case, the action was brought to set aside the sale and conveyance of certain real estate in the city of Richmond, Virginia, of which one Edwin Knotts died seized. The order of sale was obtained under a bill filed for that purpose by the guardian of the infant children of the deceased, to which his widow was a party. The case made by the pleadings and evidence was, that the property sold consisted of a house and lot, which, with a few articles of household and kitchen furniture, constituted the entire estate of the intestate; that the house was much out of repair, so much so that it could not be rented, and the parties had no means to repair it, nor had they any other property from which they could derive a support; and that it was manifestly for the interest of all parties concerned that the property should be converted into funds yielding an income. The property was sold on April 5th, 1863, the money paid and invested in Confederate bonds by order of the court, and titles were made to the purchaser. In the month of May, following the sale, the widow gave birth to a posthumous child, and the sale was attacked because this unborn child was not a party to the proceedings, nor were its interests specifically considered in the proceedings

## Opinion of the Court.

in that case. The court held that "the posthumous child did not possess, until born, any estate in the real property of which his father died seized, which could affect the power of the court to convert the property into a personal fund, if the interests of the children then in being or the enjoyment of the dower right of the widow required such conversion. Whatever estate devolved upon him at his birth was an estate in the property in its then condition. That property had then ceased to be realty; it had become, by the sale, converted into personalty." The court also relied upon the further ground that, under the laws of Virginia, "Parties in being, possessing an estate of inheritance, are there regarded as so far representing all persons, who, being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties," and refers to the case of *Faulkner v. Davis*, 18 *Gratt.* 651; and this case, upon examination, will be found to be not in conflict with the views herein presented. No other authority is cited, and the conclusion reached by the court, upon this branch of the case, is not supported by any reasoning further than that above quoted.

This case, it will be observed, was not a case in which an order of sale for partition was in question, but, on the contrary, was a case in which the order of sale which was attacked, was made by the court for the purpose of changing an unfruitful investment of the property of persons who were not *sui juris*, into something that would yield an income necessary for the support of such persons. The sale, therefore, might, perhaps, have been sustained upon the principles established by the case of *Bofil v. Fisher*, 3 *Rich. Eq.* 1, in which the Court of Equity asserted its power to bar, by its decree for sale, the interest of unborn contingent remaindermen, who, of course, could not be made parties. But such a power would only be exercised when a proper case was made for its exercise—when, as in the case of *Knotts v. Stearns*, and in *Bofil v. Fisher*, it has been ascertained, by an inquiry made for that purpose, that a sale was necessary to provide for the interests of those who could be, and were, brought before the court. A proceeding for partition is a very different matter, and presents totally different questions for the consideration of the court; and if, as we have seen, the doctrine

---

April Term, 1882.

---

as well settled that a posthumous child inherits in the same manner as if he had been born in the lifetime of his father and had survived him, we do not see how his interest could be divested by a proceeding for partition to which he was not a party, notwithstanding the inference that may be drawn from some of the remarks made in the case of *Knotts v. Stearns*, *supra*.

We think, therefore, that the defendant, Anna Waddill, was entitled to claim the same rights as the plaintiff has been shown to be entitled to, and that there was no error on the part of the Circuit judge in so adjudging.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

MR. JUSTICE MCGOWAN, absent at the hearing.

---

WILSON v. BABB.

1. A child born in lawful wedlock is presumed to be legitimate until the contrary be shown, even where born so soon after marriage that it could not have been lawfully begotten; but in such case, the evidence of illegitimacy is not required to be so strong as in other cases. This rule should be applied by the courts with a cautious regard to the peace of society and the happiness and reputation of families.
2. Any competent testimony bearing upon this question is admissible, and, if it satisfies the mind, is sufficient.
3. Impotency of the husband, impossibility of access, or cohabitation of the wife with another man, are not the only facts competent to establish the illegitimacy of a child born in wedlock.
4. A finding by the Circuit judge of the fact of the illegitimacy of a child born four and one-half months after marriage, sustained.

---

Before FRASER, J., Laurens, July, 1881.

Action for partition of a tract of land of which J. Newton Bolling died seized. Elizabeth Wilson and others, children of James and Lucinda Johnson, were plaintiffs, and the defendants

---

Statement of the Case.

---

were, at first, Tandy M. Babb, administrator *de bonis non* of J. N. Bolling, and Amanda Bolling, widow; and after her death, Tandy Babb, as heir-at-law of the widow of J. N. Bolling, and the widow and children of Melmoth Babb. Tandy and Melmoth Babb were brothers, and only heirs-at-law of Mrs. Bolling. Mrs. Bolling survived her husband, and her brother, Melmoth, survived her. The brief gives no dates.

The testimony was as follows:

*Martin Arnold*—Am connected with the family; know Elizabeth Wilson, Sarah Monroe; they were acknowledged to be children of James Johnson and Lucinda Johnson; she was also the mother of Henry Johnson; Henry Johnson was a brother to petitioners; Henry Johnson and J. N. Bolling called each other brother.

×.—Reside in Greenville county; Lucinda Johnson was the mother of Elizabeth Wilson and Sarah Johnson; never heard her claim to be the mother of J. N. Bolling; knew the parties for forty years; well acquainted with petitioners; Mrs. L. Johnson raised them.

*William Ellison*—I know Elizabeth Wilson and Sarah Monroe; they were said to be children of Lucinda Johnson; am connected with the family by marriage; knew J. N. Bolling; he was said to be a son of Lucinda Johnson.

×.—Reside in Laurens county; it was said by neighbors and connections that J. N. Bolling was a son of Lucinda Johnson; Mrs. Perrit said, during her life, that J. N. Bolling was a son of Lucinda Johnson; Mrs. Perrit and Mrs. Johnson were sisters.

*Martin Arnold, recalled*—Know that Mrs. Perrit and Mrs. Johnson were sisters; J. N. Bolling was raised by old Mrs. Bolling.

×.—Heard Mrs. Perrit and Mrs. Johnson say they were sisters; old Mrs. Bolling was the mother of Mrs. Johnson and Perrit.

*Wesley Latimer*—Know J. N. Bolling; heard him say that

---

April Term, 1882.

---

Lucinda Bolling was his mother; Lucinda Bolling was the wife of James Johnson; heard Mrs. Isabella Latimer, my former mistress, say that J. N. Bolling was taken from his mother when very small; Mrs. Latimer and Mrs. Bolling were closely connected after her marriage with Johnson; Mrs. Johnson had other children—Sarah, who married Monroe; Elizabeth, who married Wilson, and others.

×.—It was in Greenville county I saw Mr. Bolling, some twenty-two or twenty-three years ago, when he told witness that Mrs. Bolling was his mother; can't recall any other conversation that then took place between them; frequently saw before-mentioned at Mrs. Johnson's; they called her ma; Mrs. Latimer said to witness, the child was carried away when very small, but did not say where from.

*Josiah Sullivan*—I know J. N. Bolling; Lucinda Bolling was his mother, who afterwards married James Johnson; did not know the Johnson boys; when they were play-boys together, heard J. N. Bolling say Lucinda Bolling was his mother; he (Bolling) then lived at the old Bolling place.

×.—Knew J. N. Bolling well; were play-boys together; witness is over seventy years old; saw Mr. Bolling frequently after we grew up; did not know the Johnson boys; it was when they were boys heard J. N. Bolling say Mrs. Bolling was his mother.

*Phyllis Bolling*—I knew J. N. Bolling well; Lucinda Bolling was his mother; was born after her marriage with James Johnson; I knew both J. N. Bolling and his mother well.

×.—Witness belonged formerly to mother of Mrs. Bolling; carried a letter from Esquire Dunklin to James Johnson, saying he would take the child and its mother too; I carried the child to my home at Mrs. Abby Bolling's, but the mother stayed; I have heard J. N. Bolling say Mrs. Lucinda Johnson was his mother; he was then a good-sized boy; have heard Mrs. Johnson say J. N. Bolling was her son; Mr. Johnson is dead; witness was not at Mr. Johnson's for several days after the birth of the child.

---

Statement of the Case.

---

××.—Witness went for the child; got it at Mr. Johnson's house, and from the bed with Mrs. Johnson; Mrs. Johnson said it was her child, but that Mr. Johnson would not allow her to "suckle" it; witness raised the child at Mrs. Abby Bolling's; lived with him after he was grown; saw him after death; and knew him to be the same J. N. Bolling.

*Mrs. Ann H. Sullivan*—Knew Newton Bolling and his mother; Bolling was born, I think, in 1808 or 1809; his mother was then married to James Johnson; I knew Elizabeth, daughter of James and Lucinda Johnson; she married John Wilson; and Sallie, another daughter, married Francis Monroe; did not know the other children; am not related to Newton Bolling; knew his grandmother; lived near her and visited her; Lucinda was at my house several times.

×.—Lucinda was never married, except to James Johnson; about time of Newton's birth, I saw Phyllis carrying the child to his grandmother's, Mrs. Abigail Bolling; and also heard Mrs. Kinman, the midwife, speak of the circumstances of his birth about 1808 or 1809.

*Nathaniel Gaines*—Knew J. N. Bolling; report said he was son of Lucinda Bolling, born after her marriage with James Johnson.

×.—My recollection is, that James Johnson and Lucinda Bolling were married in the latter part of the summer or early fall of 1809; about four and a half months after, the child, J. N. Bolling, was born; recollect the date from the fact that my (witness) father died November 6th of that year; recollect the birth from the fact, as reported then, that Mrs. Kinman, the midwife, on that occasion, attempted to pacify Mr. Johnson by telling him that four and a half months for himself, and four and a half months for his wife, made the full nine months; was familiar with the Bolling family from a short time before said marriage; do not recollect to have heard said family, or Johnson, or his wife, speak of the child; was frequently at James Johnson's in 1809 and 1810; was there a few weeks after the birth of said child; did not, at any time, see the child or hear

---

April Term, 1882.

---

the family speak of him ; my father and Johnson's mother were brother and sister ; I have heard the Johnsons speak of the birth of the child, and his removal by order of James Johnson ; I never saw or heard of the child, J. N. Bolling, being at Johnson's, or having any communication whatever with his family ; never heard Johnson say why said child was taken away ; from frequent visits, I know the child was not nurtured by his mother, and was never recognized as a member of the Johnson family.

××.—Knew the Bolling family from shortly before said marriage ; saw James Johnson and Lucinda Bolling on one occasion at a neighborhood gathering, but did not see them associating together.

#### FOR DEFENSE.

*Tandy Babb*—Am acquainted with defendant ; is his sister ; she married Josiah N. Bolling ; I have heard members of the Bolling family speak of Josiah N. Bolling ; it was said by them that he was a son of James Dunklin ; I have frequently heard Maj. T. C. Bolling (cousin of Josiah N. Bolling, and nephew of Lucinda Bolling,) say that James Dunklin was the father of the said J. N. Bolling, and was so recognized by the whole family, and there was a striking resemblance between them ; the Bolling family regarded J. N. Bolling illegitimate ; I never saw James Johnson ; J. N. Bolling, my brother-in-law, never recognized the Johnsons as his family.

×.—Josiah N. Bolling lived in Laurens county ; married Amanda Babb, my sister, the defendant in this case ; was never married but once.

*Amanda Bolling*—Was the wife of Josiah N. Bolling ; never heard him speak of himself as the son of James Johnson ; have heard him frequently say he was not ; Josiah N. Bolling showed me a house, and said his father lived there, and his name was James Dunklin ; does not know that Lucinda Bolling was ever married.

*Phyllis Bolling*—Knew Lucinda Bolling well ; lived on same plantation with her ; four or five months after her marriage, the



---

Statement of the Case.

---

child, J. N. Bolling, was born; the mother kept the child some three days after birth, before it was sent away; Mrs. Johnson sent the child away because Mr. Johnson would not allow it to remain; would not allow her to "suckle" it; because, as he said, it wasn't his child; frequently heard the Bolling family say James Dunklin was the father of the child.

×.—Josiah N. Bolling was the son of Lucinda Johnson; witness lived with Bolling family before said parties were married; saw them married; Johnson came courting a very short time—perhaps three months.

*B. Gunnels*—I have heard Mary Perrit and her husband say that James Dunklin did not deny, but said there was no doubt but that he was the father of Josiah or Newton Bolling; Mary Perrit was a sister of Lucinda Johnson.

*Andrew McKnight*—Thornberry Bolling said to me that Josiah N. Bolling was an imperfect child, and he intended to give all his property to him and one other; said James Dunklin was his father; I heard Samuel Bolling speak of James Dunklin as the father of the child, and fought on the subject; I have heard James Dunklin say that he was the father of J. N. Bolling; J. N. Bolling has said more than once, in my presence, that James Dunklin was his father, and that Dr. Irby Dunklin was his half-brother; Thornberry Bolling was uncle of J. N. Bolling.

*Mrs. Ann H. Sullivan*—Knew Lucinda Bolling and others of Bolling family; never heard her mention Newton's name nor his father's, nor say who was his father; the wife and daughters of Lucinda's brother often spoke in my presence, and said that Newton's father was Lucinda's brother-in-law, James Dunklin, and censured both for such conduct; this was over fifty years ago; Lucinda was never married before she married James Johnson; Newton was born four or five months afterwards; saw the baby at my father's when Phyllis was carrying it to Mrs. Bolling; have heard Mrs. Kinman, the midwife, say that James Johnson would not suffer his wife to keep the child, Newton, who could not have been more than two weeks old when taken

---

April Term, 1882.

---

from his mother ; never heard James Johnson speak of Newton or claim to be his father, or deny it ; heard the wife of Lucinda's brother say that James denied being the father ; the child was removed because James denied being the father ; and this was the reason given by the Bolling family ; never heard Newton claim any one for his father.

It was conceded that the declarations of divers persons as to the illegitimacy of Josiah N. Bolling were the declarations of persons deceased at the time of trial. The plaintiffs, at the taking of the testimony and on the trial, objected in turn to any and all testimony directed to showing that anybody else than James Johnson either was, or was believed to be, the father of Josiah N. Bolling, or that James Johnson denied being the father of Josiah N. Bolling, or that Lucinda's family connection regarded Josiah N. Bolling as the child of any other person than James Johnson.

The Circuit decree was as follows :

This case was heard by me at the extra term of the court for Laurens county in July, 1881. The questions involved are somewhat new in this State, and deserve more consideration than can be given to them by a Circuit judge. I shall, therefore, state my conclusions very briefly.

The action is brought for the partition of a tract of land, the property of J. Newton Bolling, deceased, who died intestate, leaving surviving him a widow, Amanda Bolling, but no children or other lineal descendants. The plaintiffs claim that they are the brother and sister and the representatives of a deceased brother and sister, and entitled to one-half of the land. The defendants claim that they are the representatives of the widow, now deceased, and entitled to the whole tract of land, basing their claim upon the alleged illegitimacy of J. Newton Bolling, deceased.

I have examined the testimony and find nothing to show any relationship between any of the plaintiffs and the intestate, except Elizabeth Wilson and Sarah Monroe. If there is any such evidence it has escaped me. As to these two, the only evidence

---

Circuit Decree.

---

is that they were regarded and perhaps treated as the children of James and Lucinda Johnson, who were husband and wife. This, however, is sufficient if J. Newton Bolling was a legitimate child of the same parents.

The evidence is clear that Lucinda Johnson, whose maiden name was Bolling, about four and a half or five months after her marriage with James Johnson, gave birth to a son; that this son was sent off by James and Lucinda Johnson, within two or three days after his birth, to the mother of Lucinda Johnson; was nursed by a colored woman, and never afterwards became a member of the family of James and Lucinda Johnson; that from declarations of various persons, relatives of the family, some now dead, he was regarded as the son of one Esquire Dunklin, a brother-in-law of Lucinda. The same kind of evidence, on which Elizabeth Wilson and Sarah Monroe base their claim to being the legitimate children of James and Lucinda Johnson in the case, assigns an illegitimate birth to the intestate. He did not bear the name of Johnson, but Bolling, the maiden name of his mother, and not a single witness says that he ever was regarded as legitimate. The fact that James Johnson was visiting Lucinda as a suitor for some three months before marriage is not, in my judgment, such access as to affect him with the charge of having improper relations with her, in the absence of any circumstances to show that such a condition of things then existed between them.

The intestate was born in 1808 or 1809, and the evidence is such as must be relied on in these cases. I think that as a matter of fact, the intestate, J. Newton Bolling, was an illegitimate child of Lucinda Johnson, and that the evidence is sufficient to remove any presumption of legitimacy arising from the fact that he was born four and a half or five months after the marriage of his mother. It is, therefore, ordered and adjudged that the complaint be dismissed with costs.

The plaintiffs appealed upon the exception stated in the opinion, and also upon the following:

2. Because, upon the facts proved, the presiding judge on the

---

 April Term, 1882.
 

---

circuit ought to have decreed that J. N. Bolling was in law a child of James Johnson.

3. Because, it having been proved that J. N. Bolling was born in lawful wedlock, the presiding judge on the circuit ought to have decreed that according to the evidence the alleged illegitimacy of J. N. Bolling was not proved.

4. Because the said J. N. Bolling and the plaintiffs having been born in lawful wedlock, the plaintiffs are entitled to a share of the estate of J. N. Bolling.

*Mr. W. C. Benet*, for appellants.

Marriage is proof of paternity, and the old maxim of the civil law, *pater est quem nuptiae demonstrant*, subject to certain exceptions, is still the approved dogma. *Fraser's Parent and Child* 1, 62. Impotency of the husband and his absence from the realm were once the only exceptions. But the rule was extended to include proof of non-access. *Strange* 925; 1 *Sim. & S.* 153; 2 *Kent* 211-212; 2 *Greenl. Ev.* 145. Another exception is open cohabitation of the wife with a paramour. 5 *Car. & P.* 604. See, further, 2 *Phil. Ev. (Cow. & H.)* 488, note 379, 314, note 305; *Steph. Dig. Ev.* 159; 5 *Wait Ac. & Def.* 48; *Schoul. Dom. Rel.* 308. The husband here was not impotent nor *extra quatuor maria*, and there is not "perfectly satisfactory proof" that he had no access at time of the conception; and this is necessary. 2 *Kent* 21, note 5; 1 *Turn. & R.* 138; 6 *How.* 580; *Schoul. Dom. Rel.* 306; *Reeve Dom. Rel.* 270; 3 *Car. & P.* 215, 425; 2 *Munf.* 442; 1 *S. C.* 85; 15 *Id.* 421; 5 *Id.* 411; 3 *Allen* 148; 3 *Paige* 139; 1 *Desaus.* 595; 2 *Bay* 480; 10 *Rich.* 66; 1 *Ad. & E.* 444; 1 *Bish. Mar. & D.*, § 435; see particularly *Stegall v. Stegall*, 1 *Brock.* 256, which is directly in point. There is no satisfactory proof here of non-access by the husband. There is no proof of open cohabitation with another man; only vague rumors of an illicit intercourse with Dunklin—a scandal that arose after the birth of the child. This case is unlike *Shuler v. Bull*, 15 *S. C.* 421. But adulterous intercourse with another man—short of open cohabitation—is not sufficient. *Shelf. M. & D.* 711; 2 *Myl. & K.* 349. These rules apply, equally, to ante-nuptial generation. *Shelf. M. & D.* 797; 2

## Opinion of the Court.

*Munf.* 442; 1 *Brock.* 256. The declarations of husband and wife were inadmissible. 5 *Car. & P.* 604; 3 *Phil. Ev.* 1555; 22 *Md.* 337; 1 *Allen* 209; 75 *Ill.* 315; 2 *Greenl. Ev.*, § 151. Hearsay is admissible on questions of pedigree, only where it proceeds from persons proved *aliunde* to be relatives of the family. 1 *Phil. Ev.* 230–236; 1 *Greenl. Ev.*, § 103; 1 *Whart. Ev.*, §§ 201, 216; 2 *Russ. & M.* 166; 2 *Best Ev.* 845; 3 *Wall.* 187; 6 *Wall.* 642.

*Mr. James Farrow*, same side.

*Mr. J. W. Ferguson*, contra.

As appellants here claim collaterally, a question of pedigree is involved. On questions of pedigree, declarations of deceased persons connected with the family are admissible. 3 *Bouv. Inst.*, § 3071; 1 *Greenl. Ev.* 103; 3 *Phil. Ev.* 287; 3 *Stark. Ev.* 1100; 4 *Campb.* 401; 10 *Pet.* 434. As to the extent of such evidence, see 3 *Stark. Ev.* 1114–1117; 3 *McC.* 230, and cases cited. A child born in wedlock is not necessarily lawful. 8 *East* 204; 1 *S. C.* 87; 15 *Id.* 421. It is not necessary to prove impossibility of access—authorities *supra*, and *Whart. & S. Med. Jur.*, § 302; 4 *T. R.* 358; 1 *Phil. Ev.* 433; 3 *Id.* 288. Presumption of access does not arise before marriage as during coverture. The marriage, during pregnancy, raises no presumption unless the woman was so far gone as to make it apparent. *Whart. & S. Med. Jur.*, § 302; 8 *East* 207; 1 *Chit. Bl. Com.* 458; see, too, 3 *Stark. Ev.* 1100.

August 9th, 1882. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. Josiah Newton Bolling died intestate in 18—, seized and possessed of certain real estate situate in Laurens county. He left a widow, but no lineal descendants. The plaintiffs commenced this action for the partition of his lands, claiming to be heirs-at-law with the widow. Their right to this partition involved the question of the legitimacy of the deceased. During the pendency of the action, the widow died, and the present defendants were made parties as her heirs-at-law. Considerable testimony was taken, whether orally

---

April Term, 1882.

---

before the Circuit judge, or before some officer of the court, does not appear in the brief. It was taken, however, and is set out in full.

Judge Fraser, who heard the case, found, as matter of fact, that the deceased was the illegitimate child of Lucinda Johnson, the mother of the plaintiffs, and, upon this finding, he dismissed the complaint with costs. The plaintiffs have appealed, and the question which the appeal requires us to consider is, whether the judge erred in this finding. The case before us is a case in chancery, and is embraced within the appellate jurisdiction of this court, so that, although the appeal involved a question of fact almost entirely, yet it is within our cognizance, subject to the principles heretofore decided as to such appeals.

A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. 1 *Blacks. Com.* 367. "*Pater est quem nuptiae demonstrant*" is the rule in the civil law, says Mr. Blackstone, and this holds with the civilians, whether the nuptials happens before or after the birth of the child. In England, and in this country, however, the nuptials must be precedent to the birth, and while a post-nuptial birth is not conclusive upon the question of legitimacy, yet it raises a presumption which will stand until overthrown by sufficient and competent testimony. At one time, in the early history of such cases, nothing short of proof of impossibility of access, on the part of the husband, was regarded as sufficient to destroy this presumption. But such is not the law now. It now stands as any other question of fact, resting upon the testimony for and against it. *Shuler v. Bull*, 15 *S. C.* 421, and the cases there cited; *State v. Shumpert*, 1 *S. C.* 85.

While a legitimate child is one born in lawful wedlock, and a bastard is one begotten and born out of lawful wedlock, yet it does not follow that every child born in lawful wedlock is legitimate, nor does it require one to be both begotten and born out of lawful wedlock to be a bastard. The true test is whether the husband of the woman who gives birth to the child is its father; and this must, of necessity, in every case, be a question of fact. Where the child is born after lawful wedlock, and after the lapse of the usual period of gestation, it should require

## Opinion of the Court.

a very strong state of circumstances to overthrow the presumption of legitimacy, such as impossibility of access, absolute non-access, abandonment, or something equally as conclusive. But where the birth is so soon after the marriage as to render it certain, according to the laws of nature, that the child could not have been begotten during the wedlock, then it is more of an open question, depending on the weight of the testimony, aided in favor of the legitimacy, somewhat, by the marriage, but, perhaps, not to the extent of requiring such strong opposing evidence as in other cases. In every case, however, the question is still one of fact, to be determined in each special case by the principles hereinabove stated: to be administered and applied by the courts with a cautious regard to the peace of society and the happiness and reputation of families.

Judge Fraser, after a careful consideration of the testimony submitted to him, came to the conclusion that the deceased was illegitimate, and refusing the claim of those who never recognized their now alleged relationship to the deceased until after his death, and his property had become subject to partition, turned the property over to the heir of his widow, who, notwithstanding his *bar sinister*, had, in the face of it, and against all attendant reproach, united her destiny with his in early life, and had stood by him until his death. There is some justice in this result at least. But the question for this court to determine is, whether the decree of Judge Fraser can stand.

The first ground of appeal claims that J. N. Bolling, having been born of the wife of James Johnson after marriage, the law requires said Bolling to be considered and treated in the distribution of his estate as a child of James Johnson until the contrary be established by competent testimony, which must be either—First, impotency of the husband; Second, impossibility of access between husband and wife; or, Third, birth of the child during or within a competent time after the mother's cohabitation with some other man than her husband. It is true that birth during lawful wedlock presumes legitimacy which will stand until the contrary be established by lawful testimony; and if this ground had stopped at the first paragraph it would have been unobjectionable. But we know of

---

April Term, 1882.

---

no law which requires the proof of either one or all of the facts mentioned in the specifications as indispensable to the overthrow of this presumption. Either one of these facts will certainly have that effect; but there is no authority for saying that they are indispensable, one or all.

We have examined the cases relied upon by the appellants, and have extracted from them the principles as laid down above. In most of these cases the birth of the child took place during the coverture and within a competent time thereafter for the husband to have been the father during said coverture; and even in those cases, the presumption was not regarded as conclusive. Nor did they indispensably require the presence of the facts mentioned in this ground to overthrow it. The rules established in the *Banbury Peerage Case*, 1 Sim. & S. 153, were in reference to questions applicable to cases of a like character to those above referred to. These rules hold the presumption rebuttable by such facts and circumstances as are sufficient to prove to the satisfaction of the jury that no sexual intercourse took place between the husband and wife at a time when, by such intercourse, the husband, by the laws of nature, could be the father of such child.

The true doctrine, sustained by all of these cases, is found in 1 *Phil. Ev. (C. & H.'s notes)* 630, where he says: "If a child be born after the marriage of the mother and during the husband's life, it is presumed to be legitimate. It was formerly an established doctrine of the courts that this presumption in favor of legitimacy could not be rebutted, unless the husband was incapable of procreation, as from impotency, or old age, or was absent beyond the seas during the whole period of the wife's pregnancy. This doctrine was not, however, conformable to the more ancient legal authorities, but in later times it came to be established that the presumption in favor of legitimacy of the child of a married woman might be rebutted if it were shown that the husband had not opportunity for sexual intercourse within such a period of time before the birth of the child as would admit of his being the father. And, in the present day, even where a husband and wife have had opportunities for sexual intercourse at a time when the husband might have



## Opinion of the Court.

become the father of the child, a court and jury are at liberty to infer from all the circumstances of the case that no sexual intercourse took place. But when a jury believes that sexual intercourse took place between husband and wife at a time when it might have led to the conception of the child whose legitimacy is disputed, it would seem that they ought not to find the child a bastard. If, however, there was an opportunity of access, though the wife was notoriously living in adultery, it does not necessarily follow that the child is not legitimate."

These principles, as it appears from the terms employed by Mr. Phillips, were intended to apply to cases of adulterine bastardy, and their effect is to throw the protection of a very strong presumption in such cases around the legitimacy—so strong as to cast the burden of destroying it on the party impeaching it; which, however, when assumed, may be done by any competent testimony sufficient to satisfy the mind of the tribunal before whom the question is made, to the contrary. This certainly is the law in this State since the cases of the *State v. Shumpert* and *Shuler v. Bull*, *supra*.

Whether this protecting principle applies as strongly to antenuptial conception and birth afterwards, as in this case, the authorities are not very definite. In the case of *Wright v. Hix*, 12 Geo. 162, Judge Lumpkin thought it applied whether the bastardy originated before or during the marriage. "If a man," says he, "marries a woman pregnant by another person, the law presumes the child to be the husband's; and whether she was at the time a reputed virgin or *grossment enceinte*, the books make no difference. In both cases the law says, presumably, it is his child; still he may show, by whatever proof he may command, that he has been made the innocent victim of fraud and artifice. And the same proof may be adduced by any one whose interest and right it is to contest the legitimacy of the pretender; and inexpressibly hard would it be if such privilege was not allowed." But whatever doubt there may be as to where the burden of proof lies in any case, the authorities are uniform as to the character of the evidence which may be submitted. Any competent testimony bearing upon the question is admissible, and, if it satisfies the mind, it is sufficient.

---

April Term, 1882.

---

Now, how does Judge Fraser's finding of fact stand when examined by the light of these principles and tested by the rules heretofore established as to appeals involving questions of fact in chancery cases? Is there an absence of all testimony to sustain that finding? Or, even, is the manifest weight of the testimony against it? We think both of these questions should be answered in the negative. We find, in the decree, the substance of the testimony stated in a condensed form, and presented so as to show its full force. It is as follows: [Here follows the statement of the evidence contained in the Circuit decree, *supra*.] It was further in testimony that James Johnson became a suitor of Lucinda about three or four months before the marriage, and, on one occasion before, at a neighborhood gathering, they were both present, not, however, associating with each other. The only testimony on the other side was the fact that the birth took place during coverture. There was no evidence that this birth was premature. In the face of these facts, we cannot say that there was an entire absence of testimony to support the finding of the Circuit judge, nor that the weight of the evidence is against it.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

MR. JUSTICE MCGOWAN absent at the hearing.

---

HARDIN v. HOWZE.

1. The case of *Howze v. Howze*, 2 S. C. 229, determined the conditions upon which the claimant there would be entitled to a homestead, but it did not settle the existence of those conditions; and whether a homestead ever had been assigned in that case was, in this case, a question of fact for the jury.
2. At that time there was no statute covering the claim for homestead in that case, and the claim, therefore, rested alone upon the constitutional provision, which secures a homestead on two essential conditions: That the claimant is the head of a family, and that he is in possession of a dwelling-house and out-buildings on the land claimed as a homestead. When these

---

Opinion of the Court.

---

conditions do not exist, or have ceased, the exemption cannot be claimed by virtue of the constitution alone.

3. *Howze v. Howze, supra*, held (erroneously but controllingly) that the claimant was entitled to a homestead if the land contained a dwelling-house occupied by the deceased father of claimant, and if claimant was the head of a family; the Circuit judge, therefore, erred here in charging the jury that the right of claimant to this homestead expired with his minority, the former adjudication having fixed no such limitation.

---

Before PRESSLEY, J., Chester, November, 1881.

Action by John O. Hardin against William C. Howze, S. C. Howze *et al.*, commenced August 24th, 1880. The opinion states the case.

*Mr. G. J. Patterson*, for appellant.

*Messrs. J. & J. Hemphill*, contra.

August 9th, 1882. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. William Howze, late of Chester county, died in 1865, leaving a minor son, S. C. Howze, surviving, and others, his heirs-at-law. William C. Howze administered on his estate, and, finding it insolvent, he commenced action in 1869, to marshal the assets. Samuel C. Howze, the minor, was made a party, and answered by guardian *ad litem*. In his answer he claimed a homestead; the Circuit judge ordered a writ to issue to three commissioners therein named, to wit, to Elihu Lynn, John O. Hardin and Stephen R. Ferguson, commanding them to admeasure and lay off a homestead to this defendant. This order bears date September 23d, 1869.

From this order, and before action by the commissioners, an appeal was taken to this court. 2 S. C. 229. This court, in accordance with the previous case of *In re Kennedy*, held that the *ante-bellum* debts of the deceased (all of his debts being *ante-bellum*, as he died in 1865,) interposed no obstacle in the way of the homestead, nor did the fact of his decease being before the adoption of the constitution of 1868, present any

---

April Term, 1882.

---

objection, and that the right of the claimant to the homestead depended upon the facts, whether William C. Howze died in possession of a dwelling-house \* \* \* and whether the claimant was the head of a family. These facts not appearing in the proceeding, the case was remanded, the homestead to depend upon further investigation as to these.

On the return of the case to the Circuit Court, that court, April 19th, 1871, passed an order, directing C. S. Bryce, heretofore appointed receiver, to sell the real estate described in the pleadings: "So much as has been adjudged liable to the claim of, and assigned for homestead of S. C. Howze, one of the defendants, to be sold subject to said right of homestead. That the fee-simple estate of the remainder, if any, be sold," with other provisions in the order as to the distribution of the proceeds of sale not necessary to be mentioned here. On October 24th thereafter, two of the commissioners named in the original writ issued in 1869, to wit, Hardin, the present plaintiff, and Ferguson, with one Heath, not named in the writ, made a return in which they reported that, in pursuance of a writ of admeasurement of homestead for S. C. Howze, they had laid off and assigned to the said S. C. Howze, two hundred and seventy acres for homestead, which is the land now in dispute. It does not appear that this paper was ever recorded, nor that any action was taken thereon by the court. S. C. Howze seems to have been in possession, which he retained until after he became of age, when he went to Texas, whether to remain permanently or not does not fully appear. In his own testimony, he stated that he was twenty-eight years of age; that he left South Carolina in 1879, and went to Texas on a visit, and had intended all the time to return as soon as he made money enough to pay expenses; that he was farming in Texas, on shares.

Under the order of April 19th, 1871, C. S. Bryce, the receiver, sold the real estate of William Howze according to the terms of the order, to Hemphill, who, having transferred his bid to Hardin, the plaintiff, the receiver executed a deed to Hardin on November 8th, 1871, in which he conveyed three hundred acres, more or less, to him, "subject, nevertheless, to the right and claim of S. C. Howze to a homestead in the same,

---

Opinion of the Court.

---

as has been or may be adjudged by the decree and judgment of the court in that behalf."

This action is to recover possession of the land by Hardin, who claims under the deed from Receiver Bryce. The defendants all lived on the land, when the action commenced, except S. C. Howze. The jury found the land in dispute for the plaintiff, except a portion which, previous to the action, had been conveyed by plaintiff to D. B. Cloud. This was excepted in the verdict.

The judge charged as is set forth in exceptions one and two below, and declined to charge as requested in exceptions three, four, five, six and seven. The defendants have appealed upon the following grounds:

1. "Because his Honor charged that the homestead was awarded in the case of *Howze v. Howze*, in the land in dispute, to S. C. Howze, until such time as he should arrive at the age of twenty-one years, and that after that time the purchaser was to take the land so assigned.

2. "Because his Honor charged that if S. C. Howze has attained twenty-one years, the plaintiff is entitled to recover the premises in dispute, or so much thereof as he has not parted with.

3. "Because his Honor refused to charge that the court in *Howze v. Howze* having decided that S. C. Howze was entitled to homestead, is conclusive that it was a homestead in accordance with the provisions of the constitution on that subject, and an intent to the contrary cannot be inferred.

4. "Because his Honor refused to charge that such homestead must have been assigned to S. C. Howze solely on the grounds that he was the head of a family, entitled under the constitution, and that the duration of enjoyment of said homestead is unlimited as to time.

5. "Because his Honor refused to charge that an intent on the part of the court in *Howze v. Howze* to decide as to the duration of S. C. Howze's homestead otherwise than in accordance with the constitution, is not to be inferred, except upon conclusive proof of such intent.

6. "Because his Honor refused to charge that there could be

---

April Term, 1882.

---

no valid sale made of any reversionary interest in lands assigned to S. C. Howze for homestead, in *Howze v. Howze*.

7. "Because his Honor refused to charge, that it having been adjudged that S. C. Howze is entitled to a homestead in the lands in dispute, and the said lands having been assigned to him as a homestead by a court of competent jurisdiction, the plaintiff cannot impeach it in this collateral proceeding, either by showing that S. C. Howze was not entitled to homestead at all, or by showing that it had not been assigned to him as a homestead in accordance with the constitution, to wit, a homestead of unlimited duration."

We will consider the exceptions in the inverse order in which they are presented. The seventh assigns error, because the Circuit judge declined to charge that plaintiff could not impeach the homestead in this collateral proceeding, either on the ground that he was never entitled thereto, or that it had never been assigned to him, when it had been adjudged that he was entitled to it, and when it had been assigned to him by a court of competent jurisdiction.

It does not appear that the right of S. C. Howze to this homestead had ever been adjudged. The case of *Howze v. Howze, supra*, determined the conditions upon which he might be entitled, but it did not settle the fact that these conditions were present. The case was remanded to the Circuit Court to make this inquiry, so that the judge could not have properly charged the first branch of this request. The second was a question of fact which was beyond his province; whether, in fact, a homestead had ever been assigned, was for the jury.

In the third, fourth, fifth and sixth exceptions, the appellants contend that the homestead which S. C. Howze obtained, was obtained by virtue of the constitutional provision on the subject of homestead; that such a homestead is of unlimited duration, and that the judge should have so charged. At the time S. C. Howze made his claim, there was no act of assembly under which it could be secured. The act of 1868 did not meet his case. That provided a way for the widow and minor children of a deceased head of a family, who, at the time of his death, was entitled to a homestead, which this act continued for their

## Opinion of the Court.

benefit. *Gen. Stat.* 476, § 6. The father of S. C. Howze died in 1865, years before the constitution was adopted. He was not, therefore, entitled to a homestead at his death. Such being the fact, the act of 1868 did not cover the claim of S. C. Howze, and the court so held. But it also held, that if he was entitled to it, it was under the constitutional provision, and the case was sent back to ascertain whether the constitutional requirements were in existence.

No doubt it was true, then, if S. C. Howze was entitled at all to his claim, it was directly under the constitution and independent of any act on the subject. Yet, what necessity was there for the judge to charge this. The material part of the request was as to its duration, and it would have been error for the judge to charge as requested on that question. For, while there is nothing in the constitutional provision which fixes a definite period or limit to a homestead, there is certainly nothing in it which makes it unlimited. The language of the constitution is: "That a family homestead of the head of each family \* \* \* such homestead consisting of a dwelling-house, out-buildings, \* \* \* shall be exempt from attachment, levy or sale on any mesne or final process from any court."

This provision neither creates or confers any new title or property upon the claimant, but simply stays the arm of the court from touching that already in existence, to wit, the family homestead, and in favor of the head of the family. When these two conditions exist, and are present together, to wit, the head of a family and a family homestead, consisting of a dwelling-house, &c., then the constitutional homestead is in existence, free from the process of any and all courts. Standing together, they occupy a charmed circle, thrown around them by the constitution, which no process can invade; but, disunited and apart, there is no exemption or protection so far as the constitution is concerned.

Apart from the acts on the subject, the question in every case would be, Is there a head of a family, and is that head in possession of a dwelling-house and out-buildings, such as are specified in the constitution as the material for homestead? If so, the process of the courts is paralyzed, and it stands thus paralyzed as

---

April Term, 1882.

---

long as these conditions are present. But when these conditions disappear, what is there in the constitution to stop the courts? We see nothing.

This does not apply to homesteads obtained under the acts of assembly which have been passed in pursuance of the constitution. Such homesteads are governed by the acts allowing them, both as to their duration and all other qualities; but we are discussing a homestead derived solely from the constitutional provision itself as in this case. Admitting, then, that S. C. Howze derived his homestead, if any, from the constitution, and in accordance with its provisions, yet that homestead, depending as it did for its existence upon the presence of the two conditions mentioned, and the duration of these conditions not necessarily being unlimited, it would have been error for the judge to have charged that, after assignment, the homestead assigned was necessarily unlimited as to time.

This claim is a peculiar and isolated claim; such a case can never arise again. The father of the claimant died before the adoption of the constitution, and before any act on the subject of homestead was passed. If it was now before the court for the first time, no doubt the claim would be dismissed upon several grounds. Standing as it does, however, we have considered it upon its own peculiar facts, and upon principles applicable to the case as made.

Exceptions one and two complain because the Circuit judge charged that the homestead expired when S. C. Howze reached his majority. We know of no authority to sustain the position of the charge. The homestead which was assigned, if any, was under the principles laid down in *Howze v. Howze*, *supra*.

That case was, no doubt, decided erroneously, but still it was a decision of the court of last resort in the State, and it was the law for all time in that case, and authority in all other similar cases until overruled. It held that the right of S. C. Howze to the homestead which he claimed, depended, not upon his minority, but upon the two questions of fact which the case was sent back to have determined upon a new trial, to wit, whether the land upon which the homestead was claimed con-



---

Opinion of the Court.

---

tained the dwelling-house of the deceased William Howze, and whether S. C. Howze was the head of a family.

We cannot see, therefore, what the minority of S. C. Howze had to do with the case. Under the case of *Howze v. Howze*, his right depended upon the fact that he was the head of a family, and this without regard to the question whether he was a minor or not, and if he became entitled to it upon that ground, there can be no reason that it should be lost when he becomes of age, and because he arrives at age. If he obtained it while under age, because he was the head of a family, why should he not hold it after reaching his majority, if he still remains the head of a family?

We do not think that the questions raised by respondent can be considered in this case. It is admitted that the principles laid down in *In re Kennedy* and in *Howze v. Howze* were erroneous, but when the claim of this party was adjudicated, these principles controlled, and his rights became fixed; and whatever those rights may be, they are beyond assault. We think there was error in the charge of the judge as to the duration of this homestead, and on that account the case must be remanded for a new trial.

The main questions in this case, and those which should control in the new trial, are chiefly questions of fact. First, was a homestead ever assigned to S. C. Howze in accordance with the opinion of this court in the case of *Howze v. Howze*? If so, the plaintiff bought, subject to this homestead; if not, he bought free from it. The dates of the different orders and papers, the statements in the brief, and the language in plaintiff's deed, leave it in great doubt whether, as a matter of fact, any homestead was ever legally laid off and assigned, in such way as to have become complete and a bar to the purchaser at the sale ordered by the court. Whether S. C. Howze is still the head of a family in the sense of those terms as used in the constitution, is another question of fact, and, if not, whether the homestead, though once assigned, under the peculiar circumstances of this case, can be protected?

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case be remanded for a new trial.

---

April Term, 1882.

---

## STATE v. MANCKE.

1. A city license, dated in July, to retail liquors to December 31st, gave no license to sell in the January preceding, although the tax had then been in part paid, and it was customary to pay in two installments.
2. This case distinguished from *City Council v. Corleis*, 2 *Bailey* 186.
3. A grant of license by a city council without the payment of the county license required by the act of 1880 (17 *Stat.* 459), would be void.
4. *Semble*. An act commencing "on and after the passage of this act," &c., but which no otherwise names a special day for the act to take effect, goes into operation on the day of its approval by the governor.
5. An act approved December 24th, 1880, if governed by the terms of the act of 1879 (17 *Stat.* 69), and, therefore, not of force "until the twentieth day after its approval by the executive," became of force immediately after twelve o'clock midnight of January 12th, 1881.
6. The act of 1880 (17 *Stat.* 459) is not unconstitutional.

---

Before WALLACE, J., Richland, March, 1882.

The opinion states the case.

*Messrs. U. R. Brooks, R. A. Lynch*, for appellants.

*Messrs. Solicitor Bonham, Abney & Abney*, contra.

August 9th, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. The defendant was indicted for retailing without a license on January 15th, 1881, in the city of Columbia. He admitted that he had sold spirituous liquors as alleged in the indictment, but insisted that, at the time, he had a license from the city council of Columbia. He produced the following papers:

"COLUMBIA, S. C., January 13th, 1881.

"Received from Julius H. Mancke, fifty dollars on account of license for the current year.

"\$50.

"[SEAL.]

RICHARD JONES,

*City Treasurer.*"

F

---

Opinion of the Court.

---

"This must be displayed in a conspicuous place.

"No. 853.

City License.

"STATE OF SOUTH CAROLINA,  
COLUMBIA, July 20th, 1881. }

"*Mr. J. H. Mancke*—Licensed by the city council of Columbia to carry on the business of retailing in this city at corner of Washington and Richardson streets until December 31st, 1881.

"R. JONES, *City Clerk and Treas.*

"RICHARD O'NEALE, JR., *Mayor.*"

It was in evidence that the license for the last two years had been \$100 each year for the city of Columbia; that the city generally gave persons taking out license the privilege of paying the \$100 in two installments; that the license of defendant for the year previous expired on December 31st, 1880, and that the receipt above, given on January 13th, 1881, for \$50, was for the first installment of the city license for 1881; and that it was understood that the other \$50 would be paid when called for.

The license above given on July 20th, 1881, was issued when the second \$50 was paid, and no other license was issued for that year. The city clerk was directed by the mayor to issue no licenses until the city tax of \$100 was paid, and also the county tax of \$100, imposed by the act of 1880. The defendant never offered to pay the county tax or proved that he had paid the same. The Circuit judge held that the act of December 24th, 1880, was of force on January 13th, 1881, when the defendant paid the first \$50 on account of license, and that, before getting license, the defendant should not only have made his arrangements as to the city license, but have shown that he had paid the county tax of \$100 imposed by the act of 1880. Under the ruling of the judge, the jury found the defendant guilty, and he appeals to this court upon the following exceptions:

1. For that his Honor charged the jury that the act entitled "An act to further regulate the sale of spirituous liquors in this State," approved December 24th, 1880, took effect and became of force on the day of its approval by the executive.

2. For that his Honor charged the jury that the receipt

---

April Term, 1882.

---

issued by Richard Jones, clerk of the city council of Columbia, dated January 13th, 1881, and bearing the impress of the seal of the corporation, for \$50 on account of license for the year 1881, was not such evidence as would show that the city council had granted a license to the defendant to sell liquor from the first day of January, 1881.

3. For that his Honor should have charged the jury that no other day being specially named in the act prohibiting the sale of spirituous liquors, the act did not go into effect until twenty days after its approval, and that the city council having granted a license to the defendant to sell liquor during the year 1881, before the act took effect, to wit, on January 13th, 1881, the jury should bring in a verdict of not guilty.

4. That the act entitled an act "to further regulate the sale of intoxicating liquors in this State" is unconstitutional and void— (1) Because it violates section 21 of article I. of the constitution of South Carolina in this, that it impairs the obligation of the contract entered into between the city of Columbia and the defendant in the matter of license. (2) Because it violates section 38 of article I. of the constitution by depriving the defendant of his property by statute. (3) Because it violates section 9 of article I. of the constitution of the United States in this, that the act does not exempt from its provisions imported liquors to be sold in bulk.

5. That this act did not go into effect until the twentieth day after approval of the act.

Did the defendant have a license to retail when he sold spirituous liquors on January 15th, 1881? He certainly did not have any written evidence of a license in terms. His license for the year 1880 had expired, and the only evidence of a license which he then had was the receipt for \$50, given on January 13th, 1881. It is true, that afterwards, when the grand jury had returned "no bill" on indictments which had been given out in like cases, the clerk of the council, on July 20th, 1881, did issue a license for the last half of the year, and it is insisted, under the authority of the case of *City Council v. Corleis*, 2 Bailey 186, that the license granted in July had reference back and covered also the *first six months of the year*.

---

Opinion of the Court.

---

That case does hold that "the grant of a license to retail spirituous liquors from a day past, is a release of the penalties for retailing without license subsequent to that day, although prior to the taking out of a license." But this case is not at all analogous to that, which was a civil action for a penalty which the plaintiff had waived. Here the license was granted on July 20th, and does not name any day in the past from which the license was to run; but, on the contrary, is only prospective in its terms, "until December 31st, 1881." And instead of the intention being that it should have retroactive operation, the exact contrary is true. Mayor O'Neale testifies that he instructed the clerk not to issue a license until the party had complied with the State law; and the clerk testifies that no license was issued to the defendant for the first six months of the year 1881. So that even if the act of 1880 had never been passed, the defendant had no license to retail on January 15th, 1881.

But on December 24th, 1880, was approved the "Act to further regulate the sale of intoxicating liquors in this State" (17 Stat. 459), which, among other things, provides that "no license for the sale of intoxicating liquors shall be granted by any municipal authorities in any city, town or village in this State, except upon the payment by the person applying for the same to the treasurer of the county in which such city, town or village is located, the sum of \$100 in addition to the license charged by such city, town or village, for the use of such county," &c. The city council of Columbia was positively inhibited by this law from granting license to any applicant for the year 1881, without proof that such applicant had paid to the treasurer of the county of Richland \$100 in addition to the license charged by the city. There is no evidence that the defendant made such payment to the county, and if the municipal authorities of the city had actually granted a license to him without such payment (of which there is no evidence), such pretended grant, being in direct violation of the law, would have been absolutely void.

It is argued, however, that the act of 1880 did not take effect until "the twentieth day" after its approval by the governor, according to the act of 1879, which provides "that no act or joint resolution, enacted or passed by the general assembly of

---

April Term, 1882.

---

this State, \* \* \* shall take effect or become of force until the *twentieth day* after its approval by the executive, *unless some other day be specially named in the body of the act as the day upon which such act shall take effect,*" &c. The first section of the act of 1880 commences with these words: "That from and after the passage of this act, no license," &c.; but it is contended that, although in the body of the act, these words do not name specially any other day upon which the act was to take effect, and, therefore, it was not made an exception to the rule established by the act of 1879.

By section 22, article III. of the constitution, every act of the legislature becomes a law as soon as it is approved by the governor, unless its operation is postponed by some competent authority. *Ex parte DeHay*, 3 S. C. 564. Although it is recognized that one legislature cannot absolutely bind another upon subjects of substantial legislation, yet the legislature of 1879 endeavored, by the act of that year, 'to establish a convenient and just regulation in a matter merely administrative in its character, to which subsequent legislatures have conformed by so declaring when it was their intention that an act should go into operation immediately upon its passage. We have no doubt that it was the intention of the legislature to make the act of 1880 an exception, and to give it the force of law upon its approval by the governor. It is not usual to insert in an act that it is to take effect "from and after its passage." That sentence could not have been put in the body of this act for no known purpose, except to take it out of the provisions of the act of 1879 and put it into immediate operation. The year was about to close, and there were many reasons why the act should go into operation immediately.

But assuming that such was the intention of the legislature, it is insisted that the words used were not sufficient to accomplish the purpose; that no other day is specially named as the act requires. It was substantially admitted in the argument, that if the identical words "from and after the passage of this act" had been expressed in a separate section at the end of the act (as in the immigration act approved on the same day), there could have been no reasonable doubt about it. We incline to

---

Opinion of the Court.

---

think that they are sufficient, as they stand, to indicate the intention of the legislature to put the act in force immediately. "From and after the passage of this act" referred to the whole act, and meant from and after the day (December 24th) on which the act should be approved by the governor, as certainly as if that day had been "specially named." The only reason why the day of the month was not named, was because it could not then be foreseen on what day it would be approved by the governor.

But for the purposes of this case it is not necessary to make this ruling. There is no doubt that the act was approved by the governor on December 24th, and, counting that day, the twenty days fixed by the act (as December had thirty-one days) expired at twelve o'clock on the night of January 12th, which was before defendant paid his first \$50 on January 13th, and took his receipt, which, he claims, was substantially a license from the city authorities. He certainly had no pretense of license before that day. In any view, then, the act was in operation on January 13th, 1881, and the city council had no authority to grant a license unless the applicant produced the evidence that he had paid the \$100 to the county, which the act required. *Arnold v. United States*, 9 Cranch 119; *Krom v. Levy*, 60 N. Y. 126.

In the case from Cranch, Judge Story said: "It is contended that this statute (passed July 1st) did not take effect until July 2d. We cannot yield assent to this construction. The statute was to take effect from its passage; and it is a general rule that when the computation is to be made from an act done, the day on which the act is done is to be included." In the New York case, it was said: "The New York statute fixing the time from which a statute shall take effect, provides, 'every law, unless a different time be prescribed therein, shall commence and take effect \* \* \* on and not before the twentieth day after the day of its final passage.' The act prohibiting appeals to this court in cases involving less than \$500, was passed on May 2d, 1874, and did not provide when it should take effect. *The twenty-second day of May was the twentieth day after its final*

---

April Term, 1882.

---

*passage*, and consequently it became a law the instant that day began."

There is nothing in the objection that the act of 1880 is unconstitutional. We have just seen that the defendant had made no contract with the city council in regard to license for the year 1881, before the act went into operation, and, therefore, no question can arise as to impairing such a contract.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

EX PARTE BROWN AND WIFE ET AL.

EX PARTE LAYNE.

GIBBES v. GREENVILLE AND COLUMBIA RAILROAD CO.

STATE, *EX RELATIONE* ATTORNEY-GENERAL, v. SAME.

1. Claims for damages sued against a corporation itself while in the hands of receivers and reduced to judgment, (in one case by consent of the officers of the corporation, who were also the receivers,) and afterwards presented and allowed as original claims against the receiver's fund, are not entitled, as against that fund, to interest, either from the date of the judgments or from the order giving to them the right of payment—such order not having fixed the amounts due.
  2. The decision in *Ex parte Brown and Wife*, 15 S. C. 518, considered and declared.
- 

Before FRASER, J., Richland, December, 1881.

At the hearing of this appeal, Hons. A. P. Aldrich and J. H. Hudson, Circuit judges, sat in the places of the Chief Justice and Mr. Justice McGowan, who had once been of counsel in the causes. This appeal is a sequel to the case to be found reported in 15 S. C., at page 518. The opinion fully states the case.

*Mr. W. C. Benet*, for Brown and wife et al., appellants.



---

Opinion of the Court.

---

*Mr. J. E. Bacon*, for Layne, appellant.

*Mr. James Conner*, for respondents.

August 21st, 1882. The opinion of the court was delivered by

MR. JUSTICE HUDSON. In 1872 the Greenville and Columbia Railroad Company was adjudged insolvent by the Circuit Court of Richland; but its president and directors were authorized to continue in the management and control of the road, subject, however, to the orders of the court. On an appeal heretofore heard by this court, it has been held that the effect of the orders of May and June, 1872, on circuit, was to make the officers of said company receivers of the road, though not so designated, *eo nomine*.\* During the period when these orders were in force, to wit, in 1874, the aforesaid petitioners, except Mrs. Layne, received bodily injuries from an accident whilst traveling as passengers on the cars of the said company. To recover damages for these injuries, they instituted actions against the company in the Court of Common Pleas for Anderson, which, being transferred to Abbeville, judgments were there recovered at a term held April 22d, 1878.

The action of Elizabeth J. Layne was instituted by her as administratrix of the personal estate of her deceased husband, to recover damages for his death, caused by the bursting of the company's locomotive. Mr. Layne was an engine-driver in the employment of the company. This action was brought to trial at Newberry, September 15th, 1877, when, by way of compromise, the plaintiff was allowed to take judgment for \$2,000, of which sum \$500 was to be paid in cash, and the balance in monthly installments of \$90. Such was the arrangement between the plaintiff and the attorneys representing the company.

On November 23d, 1878, at a term of the Circuit Court held for the county of Richland, at Columbia, Judge Pressley, on due application, and for good cause shown, duly appointed James Conner, Esq., receiver of the property of the said company, and, by an appropriate order, conferred upon him the requisite powers, duties and responsibilities pertaining to that office. Thus, the

---

\*15 S. C. 304, 518.

---

April Term, 1882.

---

*status* of the company became clearly defined, and creditors, in compliance with the order of the court, began to come forward and establish their claims before the master. Accordingly the petitioners came in, and, by special allegations in their respective petitions, claimed the right to establish their claims against the receiver, and to be paid out of the fund in his hand arising from current income, in preference of mortgagees and other existing lien creditors.

In March, 1880, it was referred to the master to inquire into and report upon the merits of these claims; and on May 17th, 1880, he reported against their right to priority. On July 26th, 1880, the Circuit Court, sustaining the master, decreed that the petitioners had no equity to a share of income in the hands of the receiver superior to the equities of mortgagees and other lien creditors. On appeal to this court, the decree of the Circuit Court was reversed, the higher equity of the petitioners sustained, and the causes were remanded to the Circuit Court for adjudication in accordance with the judgment of this court. *Ex parte Brown and Wife*, 15 S. C. 518.

On November 1st, 1881, the Circuit Court, in order to carry out the judgment of this court, referred it to the master to ascertain and report the amounts of the several demands of the petitioners. On a hearing before the master, under this order of reference, a contest arose as to the sums to be recovered in each case; and after hearing argument, he reported that the petitioners were each entitled to recover and to receive out of the fund in the hands of the receiver, the amount of the principal, interest and costs of the judgment recovered against the company in the several actions at law before they presented their petitions to be paid from the receiver's fund.

At this reference, as also at the previous one, the parties mutually agreed that they would not renew the controversy which was originally had before the court at Abbeville and Newberry, to wit, the right of the petitioners to recover damages, but would accept the amount found by the jury in each case as the correct assessment of the damages. The petitioners thereupon claimed that they should recover on said verdicts or judgments all interest and costs, whilst the receiver claimed

---

Opinion of the Court.

---

that the demand of each petitioner against the fund *in his hand* did not rest upon the judgment, but upon the original cause of action, and was, therefore, unliquidated, and could not be augmented by any interest or costs.

On exceptions to the master's report awarding to each claimant the full amount of his judgment, interest and costs, the Circuit judge reversed the same and sustained the proposition of the receiver. The Circuit judge held that these claims are for unliquidated damages, and bear no interest; that they are not enforceable against the receiver's fund as judgments. Against this fund (he continues) they never have been in judgment, and the judgments from Abbeville and Newberry were only used in evidence by consent as a convenient mode of ascertaining the amount of damages in each case, it being far less expensive, and just as reliable, as to have summoned the witnesses and had a trial *de novo*, which might have been insisted upon. If these claims had been merged in the judgments, they would have lost that high equity on which alone they were entitled to be paid. They cannot throw off their character as judgments in order to get a standing on the equity side of the court, and again resume it in order to recover interest. Reasoning thus, the Circuit judge allowed to the petitioners the principal of their respective judgments and the costs thereon, but disallowed the interest.

From this judgment the petitioners appeal, and allege for error in the Circuit decree, that it holds that these judgments were not recovered against the receivers; that these claims are not enforceable in the Court of Equity as judgments; that they are for unliquidated damages, and do not bear interest. In this judgment the Circuit judge is correct. In the judgment of this court, in which the equitable character of these claims is established, no weight whatever is given to them because they were sued to judgment against the corporation; but, on the contrary, this court took occasion to say that those actions unnecessarily embarrassed and complicated the matter. They were adjudicated solely upon the ground of the meritorious character of the original cause of action. In fact, this court says, in that judgment: "These claims are pressed in this case, *not on account of*

---

April Term, 1882.

---

*their rank as judgments*, but on account of the cause of action on which those judgments are based. It would have been more regular to have based the claims in the Court of Equity at once on these several causes of action. This, however, would have opened the cases anew, and led to a very long and expensive investigation." In the further consideration of the questions then before the court, these claims are treated, not as judgments, nor allowed as such, but are dealt with as unliquidated demands presented for proof before the Circuit Court sitting in equity, and, as such, were adjudged to have superior equities to be paid from the receiver's fund. That judgment expressly holds that these claimants, so far as they seek payment from the income of the road in the receiver's hand, cannot be treated as lien creditors.

Against the corporation they hold judgments, and these judgments, as liens, take their due rank with other judgments against the company. Against the receiver's fund, however, they come divested of their character as judgments, and rest solely upon the equities of the original cause of action. Counsel for the appellants are in error in supposing that the judgments recovered at Abbeville and Newberry are judgments against the receivers. Those actions have none of the forms of suits against receivers, but are, in every feature, actions at law against the company, and the judgments are entered up accordingly. There is naught in the actions, nor in the defenses, which impresses upon them any equitable character, nor special claim to priority. Not until these petitions were filed on the equity side of the court in Richland, were suits instituted against the receiver, and against the fund in his hand they have never been put in judgment, the amount to which they are respectively entitled being still a matter of contention. When that contention is ended, and the amount of each definitely fixed by final judgment, then, and not till then, will they bear interest.

Had they never brought suit against the company at Abbeville and Newberry, but delayed the presentation of their claims until 1879, when they were eventually, and in due form, presented against the receiver, with a special claim of payment out of the fund in his hands, it is evident that the only recovery

---

Opinion of the Court.

---

which could have been had would have been the amount of damages received from the injuries in 1874, without interest. Now, the recovery of judgments against the company does not alter the case, nor affect, in the slightest, the amount to which they are entitled out of the receiver's fund. In the subsequent suit against him, he could have treated each claim *res integra*, and demanded proof anew. This was dispensed with only as a convenient mode of saving expense and shortening litigation; and the parties went to trial upon the equities of the claims, and the question of priority, taking the findings of the juries as the basis of recovery, if recovery could be had.

From this view of the case, it is contended by the counsel for Elizabeth J. Layne, that her claim must be excepted, because the judgment in her behalf, at Newberry, was by special consent, and stipulated to be paid in certain installments. We do not regard this as altering the case. Notwithstanding this stipulation of counsel for the company, it stands, nevertheless, just as the others do—as a *judgment against the corporation*. In asking to be paid out of the receiver's fund prior to lien creditors, for damages resulting from the death of her husband, Mrs. Layne can take nothing from this *consent judgment* more than the other petitioners from their judgments recovered *against* consent. As claims upon the receiver's fund, in a court of equity, all stand upon the same footing, and are based, not upon judgments recovered against the corporation, but upon the high equities inhering in the original cause of action.

Upon the *quantum* of damages or question of interest, her counsel also insists that interest on the judgment should be allowed, at least from the date when this court decided that the petitioners are entitled to prior payment from the receiver's fund. But it must be borne in mind that, in that judgment, this court did not fix the *amount* of recovery, but only the *right of priority* to which claims of this character are entitled. Hence, that judgment does not give a day from which interest is to be computed, because it fixes no sum to be recovered. The controversy was as to the right to be paid out of income, and not as to the amount. That question was never raised and brought directly in issue until it was submitted to the master by the

---

Separate Opinion.

---

order of the Circuit Court of date November 1st, 1881, referring it to him to ascertain and report the amount of each of these claims.

Wherefore, it is the judgment of this court that the judgment of the Circuit Court be affirmed, and the appeals in these cases dismissed.

MR. JUSTICE McIVER concurred.

MR. JUSTICE ALDRICH, *dubitante*. I am not so well satisfied with the conclusion reached by the court as expressed in the opinion of his Honor, Judge Hudson, and now proceed to give the reasons of my doubt.

The jurisdiction of law and equity are now blended in one court; therefore, in administering the law, we should be careful to preserve the equity of the case. Let me illustrate by taking the case of Mrs. Layne. So far as she is concerned, no damages can restore the slaughtered husband, or alleviate the mental agony of the bereaved wife. The verdict is not intended as compensation, but to afford the widow a scanty support for the loss she has sustained from the negligence of the company in whose service her husband lost his life, at the post of duty. The liability of the company was incurred when the accident happened. The extent of that liability was fixed when the jury assessed her damages. It does seem to me, in equity and good conscience, the verdict should bear interest.

We have said the railroad company is liable. Instead of paying these lawful debts at once to the injured parties, every obstruction that the courts afford has been thrown in the way. In the case of this bereaved widow, she has been compelled to maintain a protracted litigation, incurring long delay and heavy expense, thus diminishing the compensation for the grievous burden she has been compelled to bear, and thus adding suspense, anxiety and hope deferred to her sad fate. Now she is turned away on a technical construction without interest, the corporation having used the damages awarded to her in the prosecution of their business. It is true, the judgments were not recovered against the receiver, but against the corporation. The receiver

---

Syllabus.

---

represented the corporation; and can there be a doubt, if the cases had been again submitted to a jury, they would have provided, in their verdict, against a loss of interest by increasing the damages? I think not. If no receiver had been appointed the verdicts would have borne interest. It is the same company, when the master made his report, that it was when the injuries were sustained.

It does seem to me like straining a point, because the verdicts were accepted as the amount of assessments of the damages instead of bringing a new suit against the receiver, the interest on the same shall not be computed. I do not see, clearly, how this is in derogation of the rights and equities of other creditors. These creditors are entitled to preference, if for no other reason, because of their diligence in pressing their claims to judgment. But, I suppose, I must yield to the weight of authority and the concurring opinion of the three able judges, who have considered the case as carefully as I have. I reluctantly concur and sign the judgment of the court, doubting.

Judgment affirmed.

---

BELL v. TOWELL.

1. A will, executed in 1857 by a testator who died in 1881, is governed by the provisions of the act of 1858 as modified in the General Statutes of 1872, and, therefore, passes after-acquired real property, the terms of the will being sufficiently comprehensive for that purpose.
2. In order to reach the true intention of a testator, his will should be read in the light of the circumstances surrounding him at its execution.
3. A testator directed the residue of the estate, after payment of debts, to be kept together on the place whereon testator then lived, and as his children (who were then minors) married or became of age, the executors were empowered to give off such property as they deemed necessary; the property given to the daughters to belong to them and their bodily heirs; if any daughter died and left no issue, the said property to be returned and divided among the other children; if the wife married, the whole estate was to be sold and divided between wife and children, share and share alike; and if the wife never married, at her death the whole estate was

---

April Term, 1882.

---

to be sold and equal division made among the children. Before testator's death, the wife died, and all the children became of age and married. *Held*, that the power given to the executors lapsed and never went into operation.

4. That the direction for a division among his children, at the death of his widow, required a division at testator's death, the wife being then dead.
  5. That the limitation to the bodily heirs of his daughters was intended to attach only to the property which it was contemplated might be given by the executors to the daughters, and did not attach to the proceeds of the sale ordered in the concluding part of the will.
  6. While a will should be construed as a whole, the intention of testator cannot be declared to be the same in all its parts, unless so expressed.
  7. A sale having been directed, a partition cannot be had except by consent of all parties.
- 

Before COTHMAN, J., Edgefield, October, 1881.

This was an action by John M. Bell, as executor of George Bell, deceased, against Angeline M. Towell, Elizabeth R. Landrum, Henrietta M. Timmerman and Emily G. Shaw, commenced in September, 1881, for a construction of testator's will, which is copied in full in the opinion of this court.

The Circuit decree was as follows:

This action is submitted on the complaint and answer of defendants. The plaintiff asks for a construction of the will of his testator, and for a writ of partition of testator's real estate. The testator, George Bell, departed this life August 16th, 1881, leaving of force his last will and testament, the provisions of which are fully set forth in the complaint.

The testator's will bears date in the year 1857. Salome Bell, the wife of the testator, died soon after the date of testator's will, and many years before the death of testator. The will of testator was made when he resided on the Mine Creek Place described in the complaint. The testator removed from said place and resided elsewhere for several years before his death. He owned the Mine Creek Place and the Pinelands, described in the complaint, at the time that he made his will. The testator acquired all the rest of the real estate, described in the complaint, after the date of his will and after the death of his wife. The will is as follows: \* \* \*



---

Circuit Decree.

---

The first question that arises upon the construction of said will, is as to what estate the daughters take under the first provision of said will. The words are as follows: "The property that may be given to my daughters shall belong to them and their bodily heirs. If any one of my daughters shall die and leave no issue, then said property shall be returned back and divided among my other children or their children." The daughters takes a fee-conditional under these words of the will. If any of them die, leaving no issue, the shares of such go to the other children of testator or their children as purchasers.

The next question of importance in the construction of said will is, whether the shares of the daughters in the entire estate of the testator are subject to the provisions above stated; that is, whether their respective shares in the whole of said estate are to be held as a fee-conditional, and are subject to revert to testator's estate in case of their death, leaving no issue surviving them? Nothing was given off to any of the children of testator under the first provision of the will, nor was the estate kept together and managed as was contemplated by the second provision of the will. The testator survived his wife, and the latter never married, and the sale and division of the property upon her marriage or death, as provided by the second and third provisions, never took place. These two provisions of the will became inoperative, and the scheme of testator was defeated by the death of his wife. The first provision of the will applies to the property of testator owned by him at the date of the will, and the daughters take a fee-conditional in that part of the estate.

The testator died intestate as to all his after-acquired estate, real and personal; and this property acquired by him after the date of his will is divisible among his heirs-at-law under the statutes for the distribution of intestate estates, and does not pass under his will, and is not subject to any of the provisions thereof.

The Mine Creek and Pinelands places are subject to be divided equally between testator's children, the shares of the daughters therein to revert to the estate in case any of them die, leaving no issue. The other lands are divisible in equal shares

---

April Term, 1882.

---

in fee among testator's heirs, who are his children, the plaintiff and defendants in this action. It is not necessary that said lands, and more particularly those which are herein adjudged to pass under the will, be sold if they can be fairly and equally divided. The personal estate of testator that was not kept on the Mine Creek Place is intestate property, and is divisible among testator's heirs-at-law. It is therefore ordered that a writ of partition be issued, &c.

From this decree all parties appealed.

*Messrs. Norris & Folk*, for plaintiff.

*Mr. James Aldrich*, for Mrs. Landrum, and *Messrs. H. W. Addison, Bettis & Wardlaw*, for the other defendants.

October 2d, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. George Bell departed this life August 16th, 1881, seized and possessed of a considerable estate, consisting for the most part of eight different tracts of land situate in the counties of Edgefield and Aiken. He left, surviving him, five children, one son, the plaintiff, and four daughters, the defendants. He left a will which had been executed as far back as 1857, when his wife Salome was alive, and his children were all minors, living in his family. At that time the testator owned only two tracts of land, the old homestead whereon the family resided, and an adjoining tract known as "the Pinelands." All the other tracts of land of which he died seized were acquired after the execution of his will. Soon after he made his will, Salome, his wife, for whom ample provision was made, died, and his children all grew up and married before his death in 1881. Upon that event, John M. Bell, one of the children, and the sole qualified executor, instituted these proceedings for construction of the will, which is as follows:

"*First.* After all my just debts are paid and discharged, the residue of my estate, real and personal, shall be kept together on the place whereon I now live; and as my children marry or

---

Opinion of the Court.

---

become of age, I empower my executrix and executors to give off such negroes and other property as they may deem necessary; and the property that may be given to my daughters shall belong to them and their bodily heirs. If any one of my daughters shall die and leave no issue, then said property shall be returned back and divided among my other children or their children. My will also is, that my beloved wife Salome and children, viz., John M. Bell, Elizabeth R. Bell, Angeline M. Bell, Henrietta M. Bell and Emily G. Bell, shall remain on the said plantation where I now live. My wife (Salome Bell) shall use the proceeds of the farm for the benefit and use of the family and herself; if there shall be anything left over the support of the estate, it shall be disposed of as the executrix and executors may think most advantageous to the estate. And if my beloved wife should marry, then my whole estate shall be sold and equally divided between my wife, Salome, and my five children named, share and share alike with all. If my wife never marries, then at her death my whole estate shall be sold and equal division made among my children. Likewise, I make, constitute and appoint my beloved wife, Salome Bell, John M. Bell and John Denny, executrix and executors of this my last will and testament."

The Circuit judge held that the property owned by the testator in 1857, when he executed his will, alone passed under it; that, by the terms of the first paragraph, the daughters respectively took a life estate in their shares of that property, with limitation over to their brother and sisters "if they should die and leave no issue." But that all the property acquired by the testator, after the execution of his will, did not pass thereunder, but was intestate and subject to division under the statute of distributions in fee-simple, and ordered a writ of partition to issue for that purpose.

All the parties filed exceptions upon appeal to this court. John M. Bell and Mrs. Landrum insist that all the property owned by the testator at the time of his death passed under his will, and that the limitation attached to the property, which the executors were empowered to give off to the children in the lifetime of Mrs. Bell, should be held as applicable also to the shares

---

April Term, 1882.

---

of the daughters in the whole estate. And the other daughters, whilst agreeing that all the property owned by the testator at the time of his death passed under his will, insist that by proper construction of the will all the property should be sold and equally divided among the children without limitation, according to the terms of the last paragraph, which has no connection with the other parts of the will.

The first question is, whether the will is to be considered as disposing only of the other property which was owned by the testator at the time of its execution, or as speaking at the time of his death. At common law, a will of personal property was ambulatory, taking effect only at the death, and, as a consequence, disposed of all property then possessed by the testator, without regard to the fact whether it was acquired before or after its execution, only provided the terms of the will were sufficient to cover such property; but, for reasons which it is unnecessary to state here, the rule was different as to real property, as to which the will only disposed of that which was owned by the testator at the time of its execution.

In 1791, it was enacted "that no lands or personal estate, which shall be acquired by any person after the making of his or her will, shall pass thereby (unless the said will shall be republished); but every such person shall be considered as having died intestate as to said lands and personal estate." 5 *Stat.* 163. In 1808, an act was passed which declared, "That any person acquiring personal property after making his will shall not be considered as having died intestate as to such personal property." 5 *Stat.* 573. In 1858, it was enacted "That real estate purchased or otherwise acquired after the making and publishing last wills and testaments shall pass by and under the same, in the same manner and to the same extent as personal estate now passes." 12 *Stat.* 700. In 1872, the previous acts upon the subject were repealed; but, at the same time, a provision as to after-acquired property, both real and personal, was adopted in the following words: "Land and personal property which shall be purchased or otherwise acquired by a person after the making of his or her will, shall pass thereby, and no one shall be considered as having died

intestate as to said lands and personal estate." *Gen. Stat.* 440.

This law is perfectly clear as to all wills executed after its adoption; but the question is made, whether it should apply to wills executed before that time. It will be observed that the common law was restored as to personal property before this will was executed, and, therefore, as to that kind of property, there can be no question here. But the repeal of the act of 1791, as to real property, did not take place until 1858, a year after this will was executed, and it is contended that, as to the lands, the will must be governed by the act of 1791.

The testator did not die until the year 1881. His will, from its nature, could not take effect until that time, and falls under the operation of the law then of force, which declares "that lands and personal property acquired by any person after making his or her will, shall pass thereby, and no person shall be considered as having died intestate as to said lands and personal estate." It has been held that this embraces wills executed before as well as after the passage of the act, provided only the testator died after that time, and the terms of the will are broad enough to cover such property. *Means v. Means*, 4 *Desaus.* 243; *Jarm. Wills* 146, *note*.

There can be no doubt that the terms of this will are sufficient to cover all the property of which the testator died seized and possessed. The property is not particularly described, but is spoken of in general terms which are as applicable to property acquired after the execution of the will as to that owned at that time. It speaks of "the residue of my estate, real and personal," after his debts were paid, "the whole of my estate," &c. There is nothing in the will which indicates that the testator intended to limit its operation to the property owned by him at its date. "A residuary clause of all the testator's property of every kind and description whatever, covers all his interest in real estate otherwise undisposed of by the will, whether such interest be vested or future, contingent or reversionary." *Williams v. Kibler*, 10 *S. C.* 414; *Scaife v. Thomson*, 15 *S. C.* 358.

As the will covers and disposes of the whole estate, what is the proper construction of it? The paper is most unskillfully drawn. It is short and obscure, if not inconsistent, in its differ-

---

April Term, 1882.

---

ent parts. The difficulty of giving it satisfactory construction is increased by the fact that it was made more than twenty years before the death of the testator, when the property and the beneficiaries under it were in a very different condition from what they are now. In construing a will the leading object should be to discover the intention of the testator in the state of facts which have actually occurred, and to reach that intention it is necessary to read the will in the light of the circumstances surrounding the testator at the time it was made.

At the time this will was executed, Salome, the wife of the testator, was living and his children were all minors still in his family. He seemed to assume throughout that his wife would survive him, and her welfare during life and that of the young children during the period of nurture were manifestly the first objects of his bounty. He directed that his property should be kept together for the benefit of his wife and children during the life or widowhood of his wife, and in that view he empowered her, as executrix, and the other executors to give off to the children as they married or came of age, "such negroes and other property as they might deem necessary," declaring that "the property that may be given off to my daughters shall belong to them and their bodily heirs. If any of my daughters shall die and leave no issue, then said property shall be returned back and divided among my other children or their children." But the state of facts here provided for never actually occurred. Salome died long before the testator, and the children all grew up and married before his death. The power of the executors to give off property under this paragraph lapsed by the death of Salome and never went into operation.

The testator next provided for the possible case of his wife marrying again, but that never occurred, and the provision made to take effect in that event need not be considered. Finally, he directed that if his wife should never marry again, then, at her death, the whole estate should be sold and equal division made among his children. This event has occurred, except that, contrary to his expectations, her death occurred in his lifetime, the effect of which was to destroy the provision made for the wife and to postpone the operation of so much as related to the chil-

## Opinion of the Court.

dren until his own death, as the will could not take effect until that time. "It may be stated, as a general rule, that when the gift is to a designated individual, with a gift over in the event of his dying without having attained a certain age, or under a certain age, or under any other prescribed circumstances, and the event happens in testator's lifetime, *the ulterior gift takes effect immediately on testator's decease*, as a simple, absolute gift." 3 *Jarm. Wills* 618, note; *Williams Exec.* 1318; *Dunlap v. Dunlap*, 4 *Desaus.* 305.

In the last case cited, it is said: "It is certainly a general rule that if the legatee dies before the testator, the legacy shall be lapsed and sunk into the residuum of the testator's personal estate, although the legacy may be given to the legatee, his heirs, executors, administrators and assigns. But there are various exceptions to this rule, and, amongst others, one exception is, when the legacy is given over to others, after the death of the first legatee, for in such case the legatee in remainder shall have it immediately." The last paragraph of the will is operative as if Salome had survived her husband and died unmarried immediately after.

If Salome had survived her husband, and the executors had given off property to the children, it is at least doubtful even in that case (as none of the children died "without issue" in her lifetime), whether the words of the will were sufficient to create a good limitation over in that property, but without considering that question, we do not think that we are at liberty to take the words of limitation from the context in which they appear and transfer them to the last paragraph, which simply requires that upon the death of Salome all the property shall be sold and equal division made among the children.

It is true that in seeking after the intention of the testator, all parts of a will should be construed in relation to each other, so as, if possible, to form one consistent whole, but when the several parts of a will undertake to provide, each for a different state of facts, it cannot be affirmed, in the absence of any such expression, that his intention was the same in all the cases. Under such circumstances, we cannot venture to take part of a provision made for one state of facts, and interpolate it upon another pro-

---

April Term, 1882.

---

vision made for a state of facts entirely different. It may be possible, but we cannot hold that it was the intention of the testator, to limit over the property directed by the last paragraph to be sold and equally divided among the children. The words of limitation, by their place in the will, and the manner in which they are stated, indicate that they were intended to apply to the property which the testator understood might be given off under the first paragraph, which never went into effect. If the testator intended that the limitation should apply to the property to be taken in the final division, he should have so said, and in that case he would probably have directed the property itself divided, instead of ordering it to be sold and the proceeds divided.

The whole estate passes under the will and must be administered according to the last paragraph, without regard to the words of limitation used in connection with the property which it was contemplated might be given off to the children by the executors under the first but inoperative paragraph of the will.

As the will positively directs a sale, the property itself cannot be partitioned except by consent of all parties.

The judgment of this court is that the judgment of the Circuit Court be modified according to the principles and conclusions herein announced.

---

STATE v. TURNER.

1. An exception, "that the judgment is contrary to the law and the evidence," will not be considered by this court.
2. The late statutes forbidding the sale of liquors in *any* quantities has superseded and rendered nugatory the act of 1783 (4 Stat. 565), forbidding its sale in quantities less than three gallons.
3. A sale of spirituous liquors without license, outside of incorporated cities, towns and villages, in any quantities, is a violation of the act of 1880. 17 Stat. 459.
4. The power of the legislature to regulate the sale of spirituous liquors has been too long and too well settled to admit, now, of question; and the act of 1880, *supra*, is not unconstitutional.
5. The act of 1878 (16 Stat. 453), declaring that where imprisonment was authorized by a statute, a person convicted thereunder might be sentenced



---

Opinion of the Court.

---

to imprisonment in jail or penitentiary, with or without hard labor, was a general law, applicable to statutes afterwards enacted as well as to those then of force.

---

Before ALDRICH, J., Pickens, January, 1882.

Indictment against James Turner for retailing without license. The opinion states the case.

*Mr. T. H. Cooke*, for appellant.

*Mr. Solicitor Orr*, contra.

October 6th, 1882. The opinion of the court was delivered by MR. JUSTICE McIVER. The defendant was convicted under an indictment for retailing spirituous liquors without a license, and sentenced to pay a fine of \$200, or be imprisoned in the State penitentiary, at hard labor, for six months. He appeals upon four grounds: 1. "Because the evidence showed that the selling complained of occurred about October 15th, 1881, and that the defendant sold spirituous liquors in quantities of not less than three gallons, which he had the legal right to do, the act of 1783 being still of force in this State. 2. Because his Honor erred in charging the jury that any sale of spirituous liquors without license, in any quantity, outside of incorporated cities, towns and villages, is a violation of the act of 1880, regulating the sale of the same." The third ground makes, substantially, the same point as the second; and the fourth is the general ground that the judgment is, in other respects, contrary to the law and the evidence, which, it has been repeatedly held, will not be considered by this court.

It may well be questioned whether the evidence adduced in this case would enable the appellant to make the point intended to be raised by the first ground of appeal; for it seems from the testimony set out in the "Case," that the defendant agreed to sell three gallons to several different persons, and allowed them to take it away at different times, in such quantities as the purchasers might desire; and then follows this statement:

---

April Term, 1882.

---

"The proof further showed that any one could get whiskey from Turner, and in any quantity they desired. They simply signed a certificate that they would buy three gallons, and they took any quantity from a half pint up, paying for what they took away, and getting the remainder if they desired it. If they did not want it, they were not bound to take it. They all paid at the rate of \$2 per gallon for the whiskey they got." Under this state of facts, it might well be doubted whether the defendant could have escaped conviction, even if there were no other law upon the subject than the act of 1783, sometimes called "the three-gallon law." For selling, as this defendant is represented to have done, nominally three gallons, but really any less quantity that the purchaser might choose to take, might well be regarded as an attempted evasion of the provisions of that act, which would subject a party, so selling, to the penalties of the law.

We are not disposed, however, to rest this case upon that ground, but rather to give the defendant the benefit of the most liberal view of the evidence, and to consider the case as if the defendant had in fact never sold spirituous liquors in any less quantities than three gallons. The point raised by the first ground of appeal is that inasmuch as the act of 1783 did not forbid a sale of three gallons or more, and inasmuch as that act has never been repealed, it is not now unlawful to sell in quantities not less than three gallons. This proposition rests upon the assumption that because that act made it a penal offense to sell spirituous liquors without a license, in less quantities than three gallons, it thereby authorized the sale of quantities of that amount or larger, for all time to come, or at least until that act was repealed. This assumption is without any foundation whatever.

The right to sell in any quantity was not derived from that act, but was a right existing before any act upon the subject was passed, and the only effect of that act was to limit this pre-existing right. So that whether the act of 1783 has been repealed or not, cannot affect the question now under consideration. While the act of 1783, so far as we are informed, has not in terms been repealed, yet it certainly has been superseded by

---

Opinion of the Court.

---

subsequent legislation upon the subject. Since the Legislature has forbid the sale of spirituous liquors in *any* quantities without a license, the previous law forbidding the sale in certain quantities, has unquestionably been superseded and rendered nugatory, as the general proposition must necessarily embrace the particular or special one.

The second ground of appeal, alleging error in the charge of the Circuit judge, cannot be sustained, as it is quite clear that the law was stated to the jury just as it is declared in the act of 1880 (17 *Stat.* 459). We presume, however, from the course of the argument here, that the main object of this ground was to assail the constitutionality of the act of 1880. The power of the Legislature to regulate the sale of spirituous liquors, has been too long and too well settled to admit of question at this late day. Experience has demonstrated that the unrestrained traffic in spirituous liquors is dangerous to the peace and welfare of society, and therefore it has long been settled that the law-making power may throw such restraints around that traffic as, in the judgment of that department of the government, may be necessary to secure the peace and welfare of society; and persons who wish to deal in such an article must conform to the regulations prescribed, or they cannot claim the right so to do. There is nothing in the constitution of the United States or of this State which forbids the Legislature from exercising this power. See the *License Cases*, 5 *How.* 504; *Heisembottle ads. City Council*, 2 *McM.* 233; *City Council v. Ahrens*, 4 *Strob.* 241.

We do not understand that the power of the legislature to do this is now controverted, as a general proposition, but the appellant contends that this particular act is open to objection because of what is called its discriminating features, and because it tends to deprive the citizen of his property and of his right to sell and dispose of it. The act in question does not deprive any citizen of the right to his property or forbid his using or disposing of it, but simply prescribes the regulations to which he must conform in disposing of it, so as to prevent his using or disposing of it in such a manner as would be detrimental to the interests of society. There is no discriminating feature in the act, for the same regulations apply alike to every citizen. To obtain a

---

April Term, 1882.

---

license to sell spirituous liquors the law requires certain conditions to be complied with, and every one, without distinction, who complies with the prescribed conditions, can obtain a license, and no one who fails to comply with these conditions can procure a license.

Another point has been raised in the argument, which, though not taken in the exceptions or grounds of appeal, we propose to consider, inasmuch as it is a point of general importance that ought to be settled. The point is that, as the act of 1880 prescribes simply punishment by imprisonment for a violation of its provisions, without saying imprisonment in the State penitentiary, so much of the sentence in this case as imposes imprisonment in the penitentiary is illegal, as the defendant could only be imprisoned in the county jail. After the decision of this court in the case of *State v. Hord*, 8 S. C. 84, where it was held that a person convicted of a misdemeanor could not be sentenced to confinement in the penitentiary unless such punishment was prescribed by some statute, the act of March 12th, 1878, (16 Stat. 453,) entitled "An act to amend the law respecting the punishment for crime," was passed. That act declares "that in every case in which imprisonment is provided as the punishment, in whole or in part, for any crime, such imprisonment shall be, either in the penitentiary, with or without hard labor, or in the county jail, with or without hard labor, at the discretion of the Circuit judge pronouncing the sentence."

In the face of this act we do not see how it can be claimed that so much of the sentence in this case as imposes the punishment of imprisonment in the penitentiary is illegal. The appellant contends that the act of 1878 relates solely to those cases in which the law *then* prescribed the punishment of imprisonment, and cannot apply to cases in which the legislature has subsequently passed acts in which the punishment prescribed is by imprisonment simply, without saying imprisonment in the penitentiary, but that all such acts should be regarded as making provisions for themselves, and, in the absence of any provision as to the place of imprisonment, the rule established by the case of *State v. Hord* would apply.

We see no warrant for thus limiting the scope of the act of

---

Syllabus.

---

1878. On the other hand, we regard it as a general law applicable to all cases in which punishment by imprisonment is prescribed, and that its object was to define what is meant by the term "imprisonment" whenever it is used in any statute. The object of it, as disclosed by its title, is to amend the law respecting the punishment for crime, and, inasmuch as the law had then recently been determined by the Supreme Court to be, that when imprisonment merely was prescribed as a punishment, such imprisonment could not be in the penitentiary unless the statute prescribing it so declared, the purpose of the legislature clearly was to alter or amend that rule of law by prescribing a rule which should apply "in every case," so that whenever such a punishment should be prescribed, *the place* of imprisonment should be fixed by the discretion of the judge pronouncing sentence. Hence, whenever a statute is found, whether passed before or after the act of 1878, "in which imprisonment is provided as the punishment," such imprisonment shall be either in the penitentiary or in the county jail, according as the judge pronouncing the sentence may, in his discretion, regard the one or the other most appropriate to the circumstances of the case.

We deem it proper to add that we do not desire this case drawn into a precedent for the practice of going outside of the points raised by the exceptions or the grounds of appeal.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

SHARP v. KINSMAN.

1. An order refusing a motion for non-suit not disturbed, no error of law being shown.
2. An error in a charge is immaterial where the jury are subsequently told not to consider the matter embraced within such instruction.
3. The charge in this case held to be a charge on facts.
4. When a tenant holds over after the expiration of his lease, the landlord has no right to take the law into his own hands and eject the tenant without legal process.
5. But if the tenant is wholly out of possession, leaving on the land an immature crop, the landlord may enter the premises and appropriate the crop without the aid of legal process.

---

April Term, 1882.

---

6. The question of damages is exclusively a matter for the jury, and the Circuit judge erred in intimating his opinion thereon.
  7. In action by tenant against landlord for damages in entering upon the leased premises, seizing the crop and carrying it off, a balance due by the tenant for rent cannot be asserted as a counter-claim.
- 

Before THOMSON, J., Charleston, June, 1880.

This was an action by William Sharp against Henry W. Kinsman, commenced January 14th, 1880. The facts of the case are stated in the opinion. The presiding judge sustained a demurrer to the counter-claim, overruled a motion for non-suit, and charged the jury as follows:

The plaintiff says that the defendant, Kinsman, on the 5th, 6th and 7th January, 1880, forcibly broke into and entered lands of the plaintiff. He claims that he is still the owner of the land. The man who rents land for a year, is entitled to the possession of it for a year, and I presume that he made this statement—that the land was his—meaning for a year. He then says that on a certain farm on Charleston Neck, the said farm being in possession of the plaintiff, and without the leave of the plaintiff, the said owner did forcibly enter and carry away the vegetables of the plaintiff, and otherwise injure the premises of the plaintiff, to the damage of \$1,000. Now, what does the defendant say to that? The defendant says that the plaintiff rented about twenty acres of this farm. The defendant says that the plaintiff rented—he does not say that Green rented with the plaintiff. The question has been made in the testimony that Green was a partner, but the defendant's statement is that he was not a partner. The defendant, on the stand, stated that the plaintiff rented twenty acres of his farm, and, with a colored man, Green, was to pay rent. Does the proof correspond with his statement in the papers?

Now the next question is, that some time previous to last Christmas, the plaintiff abandoned the place and went away, no one could tell where, and, thereupon, this defendant made arrangements with the colored man, Green, to care, tend and gather said crop, which was done by the said man, Green—he

---

Statement of the Case.

---

says, in other words, that finding this person gone, that he and Green made an arrangement to care and gather the crop, and I don't think the testimony, to any considerable extent, changes this. If Green was a partner, the plaintiff would have been affected by the notice that Green had, but Green not being a partner, the notice to Green is equal to no notice at all. I have put the parties where they have put themselves.

There is a good deal of disputed law here in relation to tenancy and notice to quit. Three months' notice, where there is a tenancy for a year, should be given, and the law requires that three months' notice, in writing, should be given; and, moreover, that is reciprocal, and if the tenant wants to quit, he should give the landlord three months' notice. You may consider first whether this notice has been given. It is rather a question of law to determine whether the parties are entitled to notice or not. I don't think it necessary, in the consideration of this case, to make any ruling upon the point whether or not there was any necessity to give three months' notice, because there is another question which I will submit to you, upon which I think the case should properly turn.

We will suppose, now, that notice was actually given. We will say that, for the sake of the case, that notice was required and that notice was given, and that at the end of the year he did not quit, but still remained on the place. Did that authorize the defendant to go and take the crop to pay himself? Suppose the notice was given, and that it was the duty of the man to quit, and, moreover, we may admit that he told the party that he would leave. The declaration of the tenant that he is going to leave does not constitute *notice to quit*. But we will assume that notice to quit was duly given, and that it was the duty of the party to leave; what was the next step on the part of the landlord? It was to have a trial before a trial justice to have him ejected—the law provides this. Did the landlord do this?

It seems that the plaintiff was there in January, February and March, and gathered turnips and carried them off. I don't know who is in possession now—possession will continue until a change of that possession occurs. About the end of the year this man returns. He was off and returned again in a few days.

---

April Term, 1882.

---

What was the duty of the landlord? Suppose this had been for a debt? He would have gone to an attorney to issue an attachment. What I instruct you here is, that the defendant had no right to enter that land in such manner as he says he did. His duty was simply, at the end of a year, to take out a landlord's warrant and distrain upon the crop. He could have taken out a distress warrant, or he could have instituted proceedings to have him ejected; but it seems that he went on the place and took this crop. It does not appear that he went with any malicious intent, but it was, nevertheless, an illegal act. The law does not allow a man to take another by the collar and say, *leave*. He is bound to use the means which the law has given him. Thus it was that here the defendant committed an error. I have no doubt that he did it unintentionally; I suppose he thought it was cheaper, and you may find no very great harm in all this except that the act was illegal.

A man, however, must bear the consequences of an illegal act, and the question of damages is a question wholly for you. A counter-claim was set up here, but this is an action for tort, and no discount can be allowed. The law is always disposed to let its hand fall upon one who is not willing to abide by its provisions. I do not know that there was any ill-feeling shown in this case. You are bound to give the plaintiff the full value of the property that was taken. The defendant says he sold it for twenty dollars. You are authorized to give that and so much more as in your opinion would prevent the defendant from doing it again. A little *smart* money, as it is called. I don't think this is a case for vindictive damages, but I don't think, on the other hand, that the defendant is to be wholly excused. You should give the plaintiff the value of what has been taken, and then as much more as you think the defendant should pay; not punitive damages, but such an amount as you think would prevent a similar act again. I must say that the defendant appears to be a man of unexceptional character, but he appears to have been mistaken here. If you come to the conclusion that this plaintiff was wholly out of possession, and that all the other had to do was to enter and take possession, then it would go very far in mitigation of damages, but it would not justify him



---

Opinion of the Court.

---

in taking the crop, even if he was entitled to full possession—he had no right to take the crop—he could do that only under cover of law. If you think that the plaintiff was wholly out of possession, that would go very far to mitigate any damages that might arise in your mind, but he had no right to take the crop without process of law.

The jury found a verdict for plaintiff for \$200, and judgment was entered accordingly. Defendant appealed.

The first, second, fifth and ninth exceptions are sufficiently stated in the opinion; the others were as follows:

3. Because his Honor erred in charging the jury that the defendant's statement is, that he (Green), was not a partner, when no such statement was made by the defendant, and when, as a matter of fact, Green, the witness of the plaintiff, testified that he was a partner.

4. Because his Honor erred in charging, as follows: "Green, not being a partner, the notice of Green was no notice at all. I have put the parties where they have put themselves."

6. Because his Honor erred in charging the jury on the facts in the case contrary to the provisions of the constitution of the State.

7. Because his Honor erred in overruling the counter-claim, the same having grown out of the same transaction.

8. Because his Honor erred in charging the jury: That in this case the jury was bound to give the value of the property, and, also, smart money.

*Mr. J. B. Cohen*, for appellant.

*Messrs. McCrady & Sons*, contra.

October 7th, 1882. The opinion of the court was delivered by MR. JUSTICE MCIVER. The original plaintiff in this case having died pending this appeal, the action has been continued by an order of this Court, in the name of Warren Kinsman, as his administrator.

The object of the action was to recover damages for an alleged

---

April Term, 1882.

---

trespass on a certain piece of land claimed to be in the possession of William Sharp. It seems that Sharp had rented about twenty acres of land from Kinsman for the year 1878, and also for the year 1879, and one of the questions in the case was whether the tenancy continued in 1880, the alleged trespass having been committed early in January, 1880, when the defendant entered upon the land and took up and carried away some of the vegetables growing on said land.

When the plaintiff closed his testimony the defendant moved for a non-suit upon the ground that by the plaintiff's own showing the lease terminated on the first day of January, 1880, and that the plaintiff had failed to show that he was in possession, either legally or illegally, when Kinsman entered, and also because the testimony showed that Kinsman had entered by the consent of one Green, the partner of the plaintiff, and was not, therefore, guilty of any trespass in so entering. The motion was refused, and this constitutes the basis of defendant's first ground of appeal. The determination of the motion for a non-suit depended entirely upon the view which the Circuit judge took of the testimony adduced by the plaintiff, and we see no error of law in the conclusion which he reached.

The second ground of appeal alleges that the Circuit judge "erred in holding that a tenant, under a lease for a year, is entitled to three months' notice to quit, and in failing to make the distinction between a tenancy for a year and a tenancy from year to year." It is true that the jury were told that "three months' notice, where there is a tenancy for a year, should be given, and the law requires that three months' notice in writing should be given," and that no distinction was drawn between a tenancy for a year and a tenancy from year to year; but the jury were told immediately afterwards: "I don't think it necessary, in the consideration of this case, to make any ruling upon the point whether or not there was any necessity to give three months' notice, because there is another question which I will submit to you, upon which I think the case should properly turn." So that even if there was error in what the judge said to the jury as to the necessity for notice to terminate a tenancy

---

Opinion of the Court.

---

for a year, yet such error would be immaterial, inasmuch as the jury were subsequently told that it was unnecessary to consider the question of notice in this case.

The third, fourth and sixth grounds of appeal will be considered together, as they all make, substantially, the same point, to wit: that the judge erred in charging the jury on the facts. These grounds, we think, are well taken. One of the questions of fact in the case was whether Green was a partner or a mere employe of Sharp, and the judge, in effect, took that question away from the jury, and instructed them that he was not a partner.

The fifth ground of appeal is based on a misapprehension of the judge's charge, and need not, therefore, be considered. We do not understand that the judge charged as is imputed to him in this ground of appeal, but that his charge on this part of the case simply amounted to this: that where a tenant holds over after the expiration of his lease, the landlord has no right to take the law into his own hands and proceed to eject the tenant, but that his duty would be to call to his aid the process of the law; and in this there certainly was no error.

The ninth ground of appeal alleges that the Circuit judge erred in charging the jury as follows: "If you think the plaintiff was wholly out of possession, that would go very far to mitigate any damages that might arise in your mind, but he had no right to take the crop without process of law." We cannot assent to the correctness of this instruction as we understand it. If the judge meant, as we suppose he did, to say to the jury that even if the tenancy of the plaintiff had been terminated, and the possession of the land had been surrendered or abandoned, so that there was no obstacle in the way of defendant's entering, still he could not take the growing crop without process of law, then we think there was error in the charge. If a tenant rents a piece of land for a year, upon which he plants a crop which will not mature so that it can be removed by the end of the year, and at the expiration of his lease abandons or surrenders the possession of the land, and the landlord enters and appropriates the growing crop left there by the outgoing tenant, we do not see how he can be said to have committed any trespass.

The eighth ground of appeal complains of error in the charge

---

April Term, 1882.

---

as to damages. It does seem to us that while the jury were not told in so many words that they ought to give what was called "smart money," yet the manifest tendency of the charge upon the subject of damages was to invite the jury to give something more than the value of the property taken, and that the judge plainly indicated his opinion that they should give more; and in this we think there was error, for the question as to the amount of the damages was exclusively for the jury without any intimation of opinion from the judge as to what they should give by way of damages.

The only remaining question is that raised by the seventh ground of appeal as to whether the counter-claim should have been allowed. This being an action of tort, the counter-claim set up for the balance of the rent due for 1879, could not be pleaded unless it was based upon a cause of action arising out of the "transaction set forth in the complaint as the foundation of the plaintiff's claim," or unless it was "connected with the subject of the action." *Code*, § 173, *subd.* 1. The "transaction" set forth in the complaint as the foundation of the plaintiff's claim was the alleged trespass in January, 1880, and certainly the claim for rent in 1879 could not be said to have arisen out of that "transaction." Was it connected with "the subject of the action?" The subject of the plaintiff's action was not the land, but the violation of plaintiff's right to the possession of the land. In speaking of the proper signification of this phrase as used in this section of the code, Pomeroy, in his work on Remedies, sec. 775, p. 801, says: "It seems, therefore, more in accordance with the nature of actions, and more in harmony with the language of the statute, to regard the 'subject of the action' as denoting the plaintiff's *principal primary right* to enforce or maintain which the action is brought, than to regard it as denoting the specific thing in regard to which the legal controversy is carried on." See, also, cases cited in note 2 to section 785 of *Pomeroy on Rem.*, p. 808. We think, therefore, that the counter-claim was properly disallowed; but on account of the errors hereinbefore specified there must be a new trial.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

---

Syllabus.

---

## WILMINGTON, COLUMBIA AND AUGUSTA R. R. CO. v. LING.

1. In action by a railroad company against the sureties on the bond of a station agent, who was in arrears to the company when the bond was executed, and continued to make additional defaults in several subsequent monthly settlements, the presiding judge committed no error in charging the jury "that if the plaintiffs knew when the bond was given; that their agent was in default and indebted to them in his pre-existing agency, and yet concealed this fact and held him out to the sureties as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them."
2. But in charging further "that each default of the agent, after the bond was given, in failing to pay over to the company the money collected by him, was a breach of his duty and obligation, and gave the plaintiffs the right to dismiss him; that if knowing of these defaults, the plaintiffs condoned his fault and continued him in his agency without notice to his sureties of his misconduct, such conduct would be prejudicial to the interest of the sureties, and would discharge them;" he erred in failing to limit the discharge to defaults occurring after the first.
3. The judge erred in refusing to charge the jury "that, as matter of law, it was no fraud upon the sureties to the bond in suit that the principal was behind in his accounts at the time the bond was given, and no notice was given to the sureties."
4. He also erred in refusing to charge "that the plaintiffs were not bound to notify the sureties of each or any default of the principal agent, and that the sureties were not discharged by failure on their part to do so."

---

Before WALLACE, J., Darlington, September, 1881.

Action by the plaintiffs against Joseph J. Ling, Isaiah L. Wright, James M. Hunter and Ira M. Harrell, commenced August 20th, 1878. The opinion states the case.

*Mr. J. H. Rion*, for appellant, cited the authorities referred to in the opinion, and also the following: 2 *De G. & J.* 609; 3 *Hurlst. & C.* 437; 59 *Ga.* 685; 18 *Wall.* 662; 64 *N. Y.* 385; 1 *Pet.* 61; 1 *Story Eq.*, § 190. Upon the point that a verdict for plaintiffs should have been directed, the learned counsel cited *Code*, § 289; 35 *Barb.* 651; 15 *N. Y.* 251; 37 *Barb.* 343; 13 *S. C.* 115; 4 *Otto* 284.

---

April Term, 1882.

---

*Messrs. Boyd & Nettles*, contra, cited 8 S. C. 122; 6 *Id.* 289, 411; 14 *Id.* 177; 1 *Dow* 272, 294; 3 *Moak Eng. R.* 265; 10 *Bush* 23; 2 *White & T. Lead. Cas.* 707; 11 *Wheat.* 59; 3 *Macn. & G.* 378; 58 *N. Y.* 541; 8 *Law R. Ex.* 73.

October 13th, 1882. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The plaintiff, appellant, a railroad corporation under the laws of this State, employed the defendant, Joseph J. Ling, to act as their agent at Timmons-ville, in the county of Darlington. Some four months after the said Ling had been acting as such agent, to wit, on May 1st, 1870, he executed and delivered to the plaintiff a bond with the other parties named as his sureties, conditioned generally for the faithful discharge of his duties, and especially that he would well and truly account for and pay over to the said company all moneys that might come into his hands, or for which he might be accountable by reason of his appointment.

At the time this bond was given, Ling was behind some \$497.40. The testimony does not show whether the sureties were aware of this fact or not, when they executed the bond. Ling continued in office until February 17th, 1873, when he was dismissed, at which time he was a defaulter to the amount of \$1,737.48, which sum was afterwards reduced by certain cash receipts to \$1,526.57. The account between Ling and the company, introduced in evidence, embracing his monthly standing, showed that he was frequently behind from the beginning of his agency. These sums had been carried forward until finally, upon his dismissal, after the credits above referred to had been allowed, the balance against him amounted to \$1,526.57. For this balance the action below was brought on the bond of indemnity.

Wright, one of the sureties, was never made a party, and Ling died before the trial, so that at the trial the action stood against the two sureties, Hunter and Harrell. These defendants relied upon two defenses. First, "that Ling, before the execution of the bond sued on, having been agent of the appellants at Timmons-ville, had committed default by failing to pay over moneys collected, and was indebted, when the bond was exe-

cuted, in a considerable sum by reason of said default; that the appellants, knowing these facts, concealed the same from the defendants, Hunter and Harrell, and impliedly held out Ling as a trustworthy person and competent agent, when they knew or had reason to believe the contrary." Secondly, "that shortly after the execution of the bond, Ling made default as agent, and thereafter continued to make defaults by failing to pay over money collected by him; that these facts were known to the appellants, but, instead of dismissing Ling from their employment, they gave no notice to his sureties, condoned his faults, connived at the same, and continued him in their employment as agent." The defendants claimed that, on the first ground, the bond was void as to them, and, on the second ground, that if ever liable on the bond they had been discharged from that liability by the fraudulent conduct of the appellants. The action was submitted to a jury under the charge of the presiding judge, and the verdict was for the defendants.

His Honor, Judge Wallace, charged the jury, "that if the plaintiffs knew, when the bond was given, that Ling was in default and indebted to them in his pre-existing agency, and yet concealed this fact, and held him out to them as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them;" and, secondly, "that each default of Ling, after the bond was given, in failing to pay over to the company the money collected by him as their agent, was a breach of his duty and obligation, and gave the plaintiffs the right to dismiss him; that, if knowing of these defaults, the plaintiffs condoned his fault and continued him in his agency without notice to his sureties of his misconduct, such conduct would be prejudicial to the interest of the sureties, and would discharge them."

He declined to charge the following requests of the plaintiffs:

1. "That, as matter of law, it was no fraud upon the sureties to the bond in suit that the principal was behind in his accounts at the time the bond was given, and no notice was given to the sureties.
2. That the plaintiffs were not bound to notify the sureties of each or any default of the principal agent, and that the sureties were not discharged by failure on their part to do

---

April Term, 1882.

---

so. 3. That there is no proof whatever that the plaintiffs held out Ling as competent and trustworthy, or in any way imposed upon the sureties; and that in law the railroad company did nothing that would discharge the sureties. 4. That there is no fact for the jury to find but the default and the amount of the default; and there is no law in the case to prevent the recovery by the plaintiff of the amount proven."

The appeal is founded upon the charge, and the refusal to charge, as hereinabove.

The charge of the judge, so far as reported, seems to have been directly upon the two grounds of defense relied upon by the defendants and set up in their answer. It was nothing more than a declaration by the judge, that if the evidence in the case sustained the averments in the answer as to matters therein alleged as a defense, in law the defendants had a good defense. Subject to the modification hereinafter suggested, we think the principles laid down were sound. The law requires good faith in parties contracting with each other; and the high moral principle, that misrepresentation or concealment of a material fact in reference to the matter contracted about, or any device by the one to prevent the other from being fully informed, will vitiate the contract, is found in all text writers upon the subject of contracts, and is sustained by numerous decisions, not only in this State, but in all the courts where the English common law prevails.

This principle applies in its fullest force to contracts on suretyship. Judge Story (1 *Eq. Jur.* § 324) says: "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction; any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage, information or surprise taken of the surety by the creditor, will undoubtedly furnish a sufficient ground to invalidate the contract." See also *Ad. Eq.* \*179, where the same doctrine is announced.

The propositions of law, charged by the judge, were in accordance with these principles, except that he went too far in holding in the second proposition, that if the appellants knew of Ling's default accruing after the execution of his bond, and yet, not-



---

Opinion of the Court.

---

withstanding this, they continued to employ him, condoning his default, and giving no notice to his sureties of his misconduct, that this would discharge the sureties entirely. This, no doubt, was good law, so far as it warranted the discharge of the sureties from the culpable defaults occurring subsequent to the first default, after the execution of the bond, but it was error to hold that the sureties would be entirely discharged thereby, even though there had been a fraudulent concealment of the first default. Because, in any event, the first default was a breach of the bond, and against this the fraudulent continuation of the employment of the agent afterwards was no defense. The judge should have limited the discharge, even upon the facts supposed, to the defaults occurring after the first.

We think the judge was in error, too, in refusing to charge the two first requests of the appellants. We have carefully examined the cases referred to by counsel on both sides, and although there is some conflict in the decisions, we think the weight of the argument is in favor of the position, that there must be some positive act of concealment or misrepresentation on the part of the obligee in cases like this before the court, as to some fact which it was his duty to discharge, before the sureties can be relieved. Silence, merely, especially as to facts within the reach of proper inquiry by the sureties, will not be sufficient. The law stands between the parties perfectly impartial, ready to rebuke fraud, concealment, or misrepresentation on the part of either, but carelessness and want of proper vigilance are left to their own fruits. There must be an intent to deceive, not a mere passive omission to state everything within the knowledge of the creditor. The intent is the gist of the fraud, and this should be made to appear. *Stafford v. Newsom*, 9 Ired. 507; *De Colyar on Prin. and Sur.* 367; *Atlas Bank v. Brownell*, 9 R. I. 168; *Roper v. Sangamon Lodge*, 91 Ill. 518.

We were at first inclined to think that the presiding judge, in his charge, had laid down the law applicable to such cases in its fullest extent, subject to the modification hereinabove. He required actual concealment or misrepresentation to be found as a fact by the jury before relieving the sureties. This seemed to be all that the plaintiffs could claim. But upon examination of

---

April Term, 1882.

---

the cases, where this question has been discussed, while we do not find any legal adjudication of what will constitute concealment or misrepresentation in such form as to be applied as a test in every case where the question is presented, yet we find several decisions in other States, where certain facts have been held not to amount to such concealment. For instance it has been held as matter of law that it was no fraud upon the sureties, that the principal was behind in his accounts at the time he gave his bond of indemnity and no notice given to the sureties, and also that the obligee was not legally bound to notify the sureties of each and every default of the principal. See *The Guardian of the Stakely Union v. Stratter*, 22 L. T. Eng. 84; *Roper v. Sangamon Lodge*, 91 Ill. 518; *Pittsburg, Fort Wayne and Chicago Railroad Co. v. Shaffer et al.*, 59 Pa. St. R. 350; *Watertown Ins. Co. v. Simmons*, 131 Mass. 85; *Taft v. Gifford*, 13 Met. 187.

It is the business of the surety to see for himself that his principal performs the duty which he has guaranteed. The surety is bound to inquire for himself, and cannot complain that the creditor does not notify him of the state of the accounts. Now the principle, as laid down in these cases referred to above, is precisely what the appellant requested the judge to charge in his two first requests, and which, being refused, is made grounds of exception.

The strongest adverse case is the case of *Phillips v. Foxall*, 3 Moak's Eng. R. 264. But that case, when analyzed, does not conflict with the principles above. That case turned upon a demurrer. The defendant set up the defense, that the plaintiff had condoned the default of the servant in not paying over money collected, which the defense directly charged had been embezzled by the servant, and which fact was known to the employer, and, notwithstanding this, he had continued the servant in his employment without notice to the sureties of the embezzlement. The plaintiff demurred to this plea. The court overruled the demurrer and sustained the plea. The court said: "We think that in a continuing guarantee for the honesty of the servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and instead of dismissing the servant, as

---

Opinion of the Court.

---

he may do at once, and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." The ground of the defense in that case was the dishonest act of the servant—embezzlement—known to the plaintiff. The ruling of the court on the demurrer, which admitted the truth of the charge against the servant, was right, and the defense was properly admitted.

But there is a broad distinction between a case of that kind and a case where it simply appears that the agent is behind in his accounts. Knowledge on the part of the employer of dishonesty and corruption in his agent, without disclosure, would amount to a fraudulent concealment, but a falling behind in current accounts by an agent is not always the result of dishonesty. We do not think that simply the failure on the part of the employer to give notice to the sureties that the agent is behind in his accounts at the time he executes the bond, or that he has fallen behind since the execution of the bond, is such a fraudulent concealment of material facts as, in itself, without more, should discharge the sureties. These facts might properly go to the jury with other facts bearing upon the question of fraudulent concealment and have such weight as would be proper, but standing alone they would not be sufficient to discharge the sureties.

We think the appellant was entitled to the charge requested in the two first requests. The other requests of appellant were properly refused, involving, as they did, questions of fact mostly.

It is the judgment of this court that the judgment of the Circuit Court be reversed and the case be remanded for a new trial.

---

April Term, 1882.

---

## CATHCART v. SUGENHEIMER.

1. In action by a former lunatic to recover a lot of land sold during his lunacy under proceedings to which he was no party, instituted by his committee, the defendant may introduce in evidence the record of the probate court adjudging the plaintiff to be a lunatic and appointing a committee of his person and estate.
2. It is the well settled policy of the law to support judicial sales in all cases where the court has jurisdiction.
3. An action at law for the recovery of the property of a lunatic or damages for its detention, must be brought in the name of the lunatic by his committee, but where equitable relief is sought in the Court of Chancery, it seems that the committee may sue alone and without using the name of the lunatic as a party plaintiff, and that the judgment will be as binding upon the lunatic's estate as if he were personally present.
4. And where in such action the property of the lunatic has been sold for the purpose of paying his debts, the proceeds of sale have been so applied, and the purchaser has *bona fide* erected costly improvements, the purchaser is subrogated to the rights of the creditors to whom the payment was made and may retain possession until re-imbursed.

Before COTHAN, J., Fairfield, February, 1882.

The opinion states the case.

Mr. L. F. Youmans, for appellant.

Messrs. J. H. Rion, A. S. Douglass, contra.

October 13th, 1882. The opinion of the court was delivered by MR. JUSTICE MCGOWAN. In June, 1874, John H. Cathcart was found a lunatic under proceedings in the Court of Probate for Fairfield county. On September 2d, 1874, Samuel Cathcart was appointed the committee of the person and estate of the said lunatic. Finding the estate embarrassed to the extent of insolvency and the creditors already pressing for payment or threatening to commence suit, the said Samuel Cathcart, as committee, commenced an action in the Court of Common Pleas, alleging the

---

Opinion of the Court.

---

lunacy of John H. Cathcart, his appointment as committee, the large indebtedness of the lunatic and the necessity of selling the whole estate for the payment of the debts, and making Hopkins, Dwight & Trowbridge, and Samuel C. Clowney, as clerk of the court, who held mortgages upon certain tracts of land of the lunatic, parties defendant, but omitting to make the lunatic a party by name and service of process, as he was at that time in the lunatic asylum.

The creditors were called in and a referee appointed, who reported that the claims against the lunatic, so far as presented before him, amounted to about \$56,000, besides interest, and that he could perceive no means of discharging this heavy indebtedness without a sale of the whole estate. The court confirmed the report of the referee and (after exempting a homestead) adjudged and ordered that the real estate of said lunatic should be sold in different tracts at public auction by the sheriff of Fairfield county, on the first Monday of January, 1875, one-third of the purchase money to be paid in cash, and the other two-thirds upon a credit of one and two years, the proceeds of sale to be turned over to the clerk of the court, subject to further order.

The sale was made as ordered and the defendant, Doreth Sugenhimer, became the purchaser of a lot in the town of Winnsboro' at the sale, and after complying with the terms of sale, received a deed of conveyance from the sheriff under said order. The sheriff made his report on sales, which was confirmed by the court, May 5th, 1875. The purchaser was let into the possession and has retained it ever since, and has paid, in taxes and for repairs, something over a thousand dollars, besides \$4,025, the purchase money, which went to pay the debts of the lunatic as established.

On July 24th, 1876, the Probate Court, upon the application of the said lunatic, John H. Cathcart, passed an order superseding the commission of lunacy, and ordering the committee to turn over to him, the said John H. Cathcart, all the books and papers belonging to him, and in January of this year, 1882, the said John H. Cathcart commenced this action against the defendant for the lot of land purchased by her as aforesaid, and

---

April Term, 1882.

---

damages for the detention thereof. She claims title under the said proceedings of court and the deed of the sheriff made in accordance with the decretal order therein, and sets up special equities arising out of the payment of the purchase money and the other facts of the case.

Judge Cothran directed a verdict for the defendant, and Cathcart, the plaintiff, appeals to this court upon the following exceptions: 1. Because his Honor erred in admitting as evidence the record in the case of *Samuel Cathcart, Committee, v. Hopkins, Dwight & Trowbridge, and S. C. Clowney, as clerk of the court*, the same being as to the plaintiff *res inter alios acta*. 2. Because his Honor erred when he held that the plaintiff was not a necessary party to the action above stated, brought by said committee. 3. Because the charge of his Honor was otherwise contrary to law.

It was not error in the Circuit judge to admit in evidence the record of the case of *Samuel Cathcart, Committee of the Estate of John H. Cathcart, Lunatic, v. Hopkins, Dwight & Trowbridge, and Samuel C. Clowney, as clerk of the court, et al.* The plaintiff, before he was declared a lunatic, was the owner of the land sued for. The defendant claimed from him, through the proceedings of court, and offered the record with a view to show that the plaintiff had been regularly declared a lunatic, and the court had pronounced a judgment and ordered a sale of the land, which sale divested the title of the lunatic and transferred it to the purchaser at that sale. That is to say, it was offered as a link in her chain of title. "A judgment or decree is admissible, though *res inter alios acta*, to form a link in a chain of title, but recitals in the record are not sufficient to make out the chain as to strangers. Against them the facts must be independently proved." 2 *Whart. Ev.* § 821; *Wardlaw v. Hammond*, 9 *Rich.* 454.

The precise point seems to have been ruled in the old Court of Appeals, in one of the many trials of the case of *McCreight v. Aiken*. It seems that the committee sued alone, and when the record of the proceeding, which declared the party a lunatic, was offered, it was objected that it was not admissible in evidence for the reason that the lunatic had not been made a party. In a

---

Opinion of the Court.

---

subsequent case involving the same transaction (*Rice* 58), Judge O'Neill said: "The first ground contends that the proceedings in equity, establishing the plaintiff's lunacy, were not admissible in evidence, but the case of *John R. McCreight v. David Aiken*, decided here, December, 1836, shows that they are admissible between parties other than the lunatic."

It does not, however, follow from the admission of the record in evidence, that it must be regarded as conclusive of everything contained in it as against the plaintiff. It was received for what it was worth, still leaving as undecided the question as to its legal effect—whether John H. Cathcart, the lunatic, was substantially a party to it and represented therein, or an entire stranger and not in any way bound by a proceeding in which he, although a lunatic in the asylum, was not by name made a party. The admission of the record still left the real question of the case to be the legal effect of the proceedings as to the property of the lunatic which had been sold by the order of court.

There is no doubt that this land was purchased and paid for *bona fide* at a judicial sale, that is to say, at a sale where the property was sold under an order of court designating it and authorizing its sale. It is the well settled policy of the law to support judicial sales if it can be done without injury to any one, or the violation of any principle. The purchaser at such sale is in no danger of losing his property by proof that the order was erroneously given. It cannot be collaterally attacked for error or irregularity. The only ground upon which the title can be successfully assailed, is that the court which rendered the decree of sale, in doing so, acted without jurisdiction either of the subject-matter or of the parties. *Freeman on Void Judicial Sales* 42 (and authorities).

Did the court, in ordering this land sold, act without jurisdiction? It has not been denied that the subject-matter was within the jurisdiction of the court, but it is insisted that John H. Cathcart, although a declared lunatic at the time, should have been made a party by name in the proceedings instituted by the committee in his behalf, and that the omission to name him was a failure to make a necessary party, and the whole proceeding must therefore be declared void, and the plaintiff, never having

---

April Term, 1882.

---

been divested of his title, may now recover the lot purchased by the defendant.

There seems to be some confusion in the authorities as to the precise character of the relation which one appointed a committee of a lunatic, bears to the person and property of said lunatic. This much, however, is certain, that in this State the relation is not the same as it is in England. It was said by the Chief Justice, in the case of *Ashley v. Holman*, 15 S. C. 106: "There is no doubt that the Lord Chancellor, under the sign manual of the King, was the special custodian of this important class of society there, and that committees were his agents and responsible to him. It was not a subject-matter over which his court had jurisdiction, but it was a power conferred upon the Lord Chancellor as the representative of the Crown, to be exercised as a special and personal duty. But whatever may have been or may now be the law in England on the subject, or whatever may have been its origin there, this principle has never prevailed practically in this country." We must, therefore, look for light only to the nature of the relation and our own law as shown by the decided cases.

We may take it as also certain that the mere appointment of a committee to take charge of the person and property of a lunatic, does not *ipso facto* transfer to the committee legal title to the property of the lunatic, as the appointment of an assignee in bankruptcy transfers to him the legal title of the bankrupt by the express terms of the act. The title of his property still remains in the lunatic, even after the appointment of his committee. In this respect the relation may be regarded as analogous to that of guardian and ward.

In the case of *McCreight & McCreight v. David Aiken*, 3 Hill 338, Robert McCreight had been declared a lunatic, and the plaintiffs, his sons, appointed his committee. They brought an action at law for a gig and other personal property alleged to belong to the lunatic, and to have been unlawfully taken from him by the defendant. Judge Butler non-suited the plaintiffs, saying that "the legal relation of a committee to a lunatic is analogous to that of a guardian to his ward. For any trespass to the person or property of a minor, an action must be brought



## Opinion of the Court.

in his name by his guardian, and why should not an action be brought in the same way for a trespass on the person or property of a lunatic? Such a person has a legal existence that is under the protection of the law, and he can take and hold property, real and personal." This ruling was affirmed by the old appeal court, and it seems to be settled in South Carolina that in an action at law, for the recovery of the property of a lunatic, or damages for its detention, the action must be brought in the name of the lunatic by his committee, as in such action he only can recover who has the legal title. *Petrie v. Shoemaker*, 24 *Wend.* 85.

But, as we understand it, the rule is not peremptory when the relief prayed for is equitable in its character, and is sought through the forms of Chancery. It is the settled doctrine of this State, that the Court of Equity takes special charge of infants, lunatics and other persons under disabilities, and in doing so exercises large powers over their property under the control of trustees for their benefit, even when such persons under disabilities are before it only substantially and by representation. The doctrine is well stated in the case of *Spencer v. Godfrey*, *Bail. Eq.* 468: "The jurisdiction of the Court of Equity to dispose of the real estate of infants and other persons under disability, has been too long exercised to be now questioned, and a conveyance or mortgage executed by the master in pursuance of an order of the court, which was intended to operate on the title of infants, is binding on them, if they are parties to or represented in the proceeding in which the order was made." This case was approved in *Moore v. Hood*, 9 *Rich. Eq.* 327, so far as it decided that infants equally with adults are bound by a decree until it is reversed or vacated.

It seems that all that is considered absolutely necessary to the exercise of this beneficent power, is that the party incapable of acting for himself shall be substantially and fairly represented before the court, and the court should be satisfied that the proposed action is for the benefit of such incompetent person. Some seeming inconsistency, as to who are necessary parties, has arisen from overlooking this difference between the practice in actions at law and in equity. Judge O'Neill says that "all the con-

---

April Term, 1882.

---

fusion has arisen from confounding a rule of practice in Chancery with one at law." *Rice* 59.

The proceeding in this case was not an action at law for the recovery of property of the lunatic, but regarding the committee as a trustee, and the lunatic as *cestui que trust*, it was a proceeding on the equity side of the court to anticipate a compulsory and ruinous cash sale of property belonging to the lunatic to pay his debts by obtaining an injunction against creditors and an order for sale on credit. The relief prayed for was purely equitable, and the question is, whether Samuel Cathcart, when he instituted the proceedings expressly as committee in behalf of the lunatic, so represented him and his interest that he may be regarded as a privy in the action and bound by the sale made thereunder.

The question is one of form rather than of substance. For, at the time the extraordinary powers of the Court of Equity were invoked in his behalf, John H. Cathcart was *non compos mentis*, and incapable of doing anything toward the protection of his person or property. For that very reason the court had put him in charge of a guardian, who instituted the proceedings expressly, and in terms, for his benefit. They concerned only him and his property, and were, undoubtedly, intended to be his proceedings. Possibly, it would have been more regular if he had been joined as a co-plaintiff with his committee; but if that had been done, there is no reason to suppose that the judgment would have been different; and if he had been made a defendant by name and nominal service, it is not perceived who could have answered for him but his committee, already before the court, as plaintiff.

As was said in the case of *Executors of Brasher v. Van Cortlandt*, 2 Johns. Ch. 242: "If he had been joined, it would seem to be mere matter of form. \* \* \* If he be made a defendant, he is to answer by his committee. When the committee is made defendant, there can be no use in joining the lunatic also, for the custody of the estate is no longer in him, but in this court under the administration of the committee. \* \* \* This question of necessary parties is always, more or less, a matter of

## Opinion of the Court.

discretion, depending on convenience. In this case it would be quite absurd to bring in a party who has no capacity or power of action, except by the very persons before the court as his trustees, and where the court is only to look to the certainty of the debt and to the state of the assets in order to provide for its payment." See *Cooley Const. Lim., ch. V., p. 97.*

The old Court of Equity, in this State, did not regard it necessary that the lunatic should be formally made a party to sustain an order made by that court concerning his rights, or even the sale of his land at the instance of his committee. *Ex parte Drayton*, 1 *Desaus.* 136; *Sims v. McLure*, 8 *Rich. Eq.* 286. The case from Desaussure is very meagerly reported, but it seems to have been much like this case. Upon petition of committee, the court ordered the lands of the lunatic, Thomas Drayton, sold, and the commission of lunacy was afterwards superseded. In the case from Richardson, J. S. Sims was appointed committee of one Thaddeus C. Sims, a lunatic, and, without making the lunatic a formal party, filed the bill to set aside sales of certain slaves made by the said Thaddeus, and certain judgments confessed by him before the inquisition. The proof as to some of the charges was held to be insufficient, but the bill was sustained and a reference ordered as to other charges.

By way of suggesting the best practice, Chancellor Wardlaw in that case said: "The practice of instituting such a suit in the name of the committee only, is sustained by high authority. *Story Eq. Pl.*, § 64; *Ortley v. Messere*, 7 *John. Ch.* 139. But where, as in this State, the maxim of the common law, that one cannot stultify himself, is not recognized, it is certainly better to follow the general rule of pleading to make all parties to the suit who are materially interested in the object of it, and not to litigate and indulge concerning the estate of any person, even a lunatic, who is not before the court." In the case he referred to from New York, where, under their statutes, a different practice prevails, Chancellor Kent said: "The general practice is to unite the lunatic with the committee, as was done in 2 *Vern.* 678, but there does not appear to be any use in it or any necessity for it, as the committee have the exclusive custody and control of

---

April Term, 1882.

---

the estate and rights of the lunatic. The lunatic may be considered a party by his committee, and, like trustees of an insolvent debtor, the committee hold the estate *in trust* under the direction of the court." *Story Eq. Pl.*, § 65.

It is true that the code, § 134, provided that "every action must be prosecuted in the name of the real party in interest," but this does little more than give expression to the general principle long established, that all parties interested in the subject-matter of the suit should be made parties. The code does no more, but on the contrary declares an exception that "an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted." Where the lunatic is sued, the code directs that the summons be served by delivering a copy to the committee or guardian, and to the defendant personally, but we discover no direction where the lunatic or his committee is the party *who sues*.

In such case it would seem the merest form whether the title of the case should be "John H. Cathcart, lunatic, by his committee, Samuel Cathcart," or, as in this case, "Samuel Cathcart, committee of the estate of John H. Cathcart, lunatic." We do not consider that these provisions of the code change the old practice in this particular, so as to require us to declare this sale void. *Mitford's Ch. Plead.* (6 Am. edit.) 31 and note; *Person v. Warran*, 14 Barb. 488; *Fields v. Fowler*, 2 Hun 400; *Ashley v. Holman*, 15 S. C. 97. In the last case cited, which has been decided in our State since the adoption of the code, the Chief Justice, in delivering the judgment of the court, says: "If this was an action in behalf of the lunatic for an unsettled demand on account of wages earned by his labor, then the lunatic himself should have been party plaintiff, but this is not an action strictly for the wages of the lunatic. It is a case *in Chancery* by a trustee against the representatives of a former trustee seeking an account," &c.

But if, from the increased strictness latterly required in this State on the subject of making parties, the lunatic must be regarded as a *necessary party*, though merely a formal one, we think there is merit in the equitable defense set up. It is quite

---

Syllabus.

---

certain that the defendant purchased the lot *bona fide*, relying upon the orders of court, and that improvements have been made, and that the purchase money went towards satisfaction of plaintiff's debts. It does not appear that he made any offer of the money thus expended for his benefit. We cannot see why the purchaser in this case should not be entitled to be subrogated to the claims which she by her purchase paid.

Wherein did this sale differ from that of the property of a decedent for the same purpose? "If, by a sale of the lands of a decedent, his debts are paid, and it turns out that the sale is void, the purchaser has the right to be subrogated to the claims which he has by his purchase paid. And he has also the right to retain possession of the property as security for the repayment of the sums to which he is entitled." *Freeman on Void Judicial Sales* 51. As Judge Story says in *Bright v. Boyd*, 1 Story 478: "Such principle has the highest and most persuasive equity, as well as common sense and common justice, for its foundation."

The judgment of this Court is that the judgment of the Circuit Court be affirmed.

---

WHEELER v. COUNTY OF NEWBERRY.

1. Where a creditor of a county desires to enforce an audited claim, should he proceed by *mandamus* or by ordinary civil action?
2. The act of 1878 (16 Stat. 311), authorizing the appointment of a commission to ascertain the indebtedness of the several counties of the State, did not constitute such a commission a court, and therefore an adjudication by it upon a claim against their county, not submitted to it by the claimant, is no bar to a subsequent action in the Court of Common Pleas upon the claim.
3. An audited claim against a county does not bear interest until judgment recovered thereon.

---

Before KERSHAW, J., Newberry, November, 1880.

Action by David H. Wheeler, individually, and as survivor of Wheeler & Hiller, against the county of Newberry, commenced in September, 1879. The opinion states the case.

---

April Term, 1882.

---

*Messrs. Jones & Jones*, for plaintiff.

The position of counsel upon the plaintiff's ground of appeal was as follows :

If, however, none of the above propositions are sufficient to entitle the plaintiff to interest, then we say he is certainly entitled to interest from the time certificates of indebtedness were issued to other creditors for past due claims ; for the resolution approved March 22d, 1878, directs certificates to be issued not only to the creditors whose claims have been passed by the commission appointed under the act of the legislature, approved June 11th, 1877, *but also to those persons whose claims "may hereafter be adjudged valid by some court of competent jurisdiction."* The said resolution further says: "Said certificates to bear interest at the rate of seven per cent. per annum, from the date of issue, *which shall be the same date in each case.*" The plaintiff's claim has been adjudged valid in this case by a court of competent jurisdiction, and he is, on that ground, entitled to interest, at least from the time others receive it on their past due claims.

*Mr. F. Werber, Jr.*, for defendant.

October 18th, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. The plaintiff had an open account (\$643.80) against the county of Newberry for lumber, alleged to have been delivered in 1870. He presented the account to the county commissioners, who approved it, and ordered it paid October 22d, 1870. The treasurer made payments as follows : May 1st, 1874, \$109.85, and on May 15th, 1876, \$139.37. This action was brought for the balance due and interest. The defendant answered, insisting that as the county of Newberry was not a body corporate, it could not be sued, and that the demand sued on was *res adjudicata*. That it had been examined by a "commission" appointed by the governor, under the act of 1877, "to investigate and ascertain the actual *bona fide* indebtedness of the various counties in this State, and to regulate the manner of paying the same" (16 *Stat.* 311), and that said commission reported upon the claim and scaled it down to \$132.03,

## Opinion of the Court.

which was a conclusive adjudication of the true and *bona fide* amount due.

On the trial the plaintiff proved the sale and delivery of the lumber, that the board of county commissioners had audited the claim and ordered it paid, that "payment was deferred for want of funds," and that he never put his claim before the said "commission," which did, however, consider it *ex parte*, and reject all but the amount of \$132.03. Judge Kershaw charged the jury that the county of Newberry was a body corporate, and might be sued; that "the commission," appointed by the governor, was not a court whose decisions were binding on parties who did not accept it as a board of arbitration; that the plaintiff, if they believed the proof, was entitled to recover the amount of his account, but not interest.

The plaintiff appealed because interest was not allowed him, and the defendant having failed in a motion for a new trial, appealed upon the following grounds:

1. Because his Honor erred in holding and charging the jury that the county of Newberry is a body corporate, so as to be sued in this action.

2. Because his Honor erred in holding that the "commission," created by the act of the general assembly, approved June 11th, 1877, was not a court of subordinate and special jurisdiction to pass upon the validity of claims sued on in this action, in order to investigate and ascertain the true and *bona fide* indebtedness of Newberry county.

3. Because his Honor erred in refusing to charge as requested, that the plaintiff's claim, having been considered by the said "commission" and sustained in part and in part rejected, was *res adjudicata*.

4. Because his Honor erred in holding that the approval of the board of county commissioners of the claim sued on could be proved by the endorsement of "Mathew Gray, chairman," in one instance, and by the signatures of Henry Kennedy and Simpson Young, members of the board of county commissioners, in the other; when, it is submitted, to prove such approval the records of the board of county commissioners should have been

---

April Term, 1882.

---

produced, or at least the written approval of the said board signed by all the members.

5. That his Honor erred in refusing a new trial on the minutes.

We have lately had occasion, in the case of *The County of Richland v. Miller*, 16 S. C. 244, to consider the force and effect of the audit of a board of county commissioners with reference to the question as to what is and what is not within the scope of their authority, but the court has never been required to consider how a creditor, having a claim already audited, should proceed to enforce it against the county—whether, considering the audit as a judgment of the tribunal established for the purpose of deciding county claims, he should seek to enforce it by *mandamus*, requiring the county commissioners to have the money raised to pay it, or sue upon it in the Court of Common Pleas to get thereby an enforceable judgment against the county. There is some want of uniformity in the practice of the different States upon the subject, and until the point is made and argued before us we will make no ruling upon it. For the purposes of this case it is enough to say that it has been the practice in this State, to sue the county, which by the express terms of the act is “a body politic and corporate,” and as such, authorized “to sue and be sued.” *Ex parte Williams*, 7 S. C. 72; *Greenville County v. Runion*, 9 S. C. 4; *Ostendorff v. County Commissioners of Charleston*, 14 S. C. 403; *Holmes & Calder v. County of Charleston*, *Id.* 146; *Edmonston v. County of Aiken*, *Id.* 622.

We do not think that the Circuit judge was in error when he charged the jury that “the commission” appointed by the governor was not a court with judicial power to determine authoritatively county claims. It was not intended to do more than to obtain information which would lead to the exposure of fraud and possibly to further action by the county commissioners or the legislature. After the report called for by the act was made for Charleston county, another act (1878) was passed, “to provide for funding the debt of Charleston county and for the payment of the expenses incurred in ascertaining the same.” 16 *Stat.* 692. The scheme for settling the county claims provided by this act, with the right of appeal to the Court of Common



## Opinion of the Court.

Pleas, was accepted by the creditors who presented their claims, and the indebtedness of Charleston county was thus settled. *Holmes & Calder v. County of Charleston, supra.*

No such act was ever passed for the settlement of the indebtedness of Newberry county. The joint resolution of the legislature (1878) to authorize the county commissioners of certain counties "to fund the past indebtedness of certain counties and provide a mode of liquidating the same" (16 *Stat.* 681), did include the county of Newberry, but that resolution only authorized the county commissioners "to issue certificates of indebtedness to all holders of claims for the amounts reported to be due by the commission appointed to investigate and ascertain the *bona fide* indebtedness of the county, and as may hereafter be adjudged valid by some court of competent jurisdiction." This itself is conclusive that the commission was not claimed to be a court of competent jurisdiction, and their reports binding on the parties as judgments. The county commissioners could not issue their certificates upon the authority of the commission alone, but had to wait until judgment was rendered by a competent court, which might adjudge as valid the whole or a part of their ascertainment, or for a larger amount *Ex parte Childs*, 12 S. C. 118.

It is not necessary to consider whether the endorsement of the county commissioners, on the back of the account—"approved and ordered to be paid"—was of itself sufficient proof of the audit, or whether parol evidence of the fact was admissible. The *pro rata* payments made by the county treasurer afforded evidence of the audit. Besides, as we understand, the plaintiff did not rest upon the audit, but seems to have proved the account itself, relying upon the audit simply as an admission of those in authority.

The terms of the resolution also settle the question of interest. The county commissioners could not issue the certificate until the claim was adjudged to be valid by the court, and the terms of the resolution are, "said certificates to bear interest at the rate of seven per cent. per annum from the date of issue, which shall be the same date in each case." The certificate does not issue upon the authority either of the audit of the county commission-

---

April Term, 1882.

---

ers or the report of the commission, but by virtue of the judgment in the Court of Common Pleas. A judgment only bears interest from its recovery, and the certificate which issues in satisfaction of that judgment is made to conform to it. In the case of *Holmes & Calder*, in reference to claims against the county of Charleston before referred to, it was held, in express terms, that "an open account audited by a board of county commissioners does not draw interest from the date of audit."

It is the judgment of this court that the judgment of the Circuit Court be affirmed and the appeal dismissed.

---

## STATE v. EVANS.

1. Defendant was convicted under an indictment that alleged a burglary in "a gin-house, situate within the curtilage of the dwelling-house." *Held*, that judgment should be arrested, because the indictment failed to allege that the gin-house was within two hundred yards of the dwelling-house and appurtenant to it, two averments that were essential under the statute. *Gen. Stat.* of 1882, § 2483.
  2. And the defendant having been tried, convicted and sentenced for statutory burglary, the conviction cannot be referred to the indictment as sufficiently charging the higher offense of burglary at common law.
- 

Before ALDRICH, J., Abbeville, February, 1882.

The opinion states the case.

*Mr. T. P. Cothran*, for appellant.

*Mr. Solicitor Orr*, contra.

October 21st, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. George Evans was convicted of burglary and sentenced to three years in the penitentiary under an indictment in the following terms: "That George Evans, late of the county and State aforesaid, on February 7th, 1882, with force and arms, at Abbeville court house, in the county

## Opinion of the Court.

and State aforesaid, in the night-time of the same day, the dwelling-house; that is to say, the gin-house, situate within the curtilage of the said dwelling-house of one James D. Fooshe, in the county and State aforesaid, feloniously and burglariously did break and enter," &c. The testimony showed that the gin-house was eighty yards from the dwelling-house of J. D. Fooshe, within the common enclosure; was used for storing cotton in the seed and ginning, and as a shelter for his stock; and was an appurtenance of the dwelling-house.

Upon being arraigned for sentence, the defendant made a motion in arrest of judgment upon the following grounds: 1. "That the indictment was fatally defective in not alleging that the gin-house, the subject of the burglary, was within two hundred yards of the dwelling-house of the prosecutor. 2. That the indictment was fatally defective in not alleging that the said gin-house was an 'appurtenant' to the dwelling-house of the prosecutor." The motion was refused. He now appeals to this court, and renews the motion upon the grounds stated.

It appears that the evidence brought the case within the definition of burglary under the statute, so far as the subject of it was concerned, for the gin-house was shown to be within eighty yards of the dwelling-house of the prosecutor. The question, however, is not as to the facts proved, but as to the sufficiency of the allegations in the indictment. "An indictment is the complaint of the State against the accused. It should charge some offense cognizable by the court, and this offense, whatever it may be, should be clearly and distinctly set forth. The crime charged should be described with certainty, for no latitude of intention will be allowed to include anything more than is expressed." *State v. McKettrick*, 14 S. C. 353. Nor can the evidence supplement the statements of the indictment. "Every indictment must contain and set forth all the necessary ingredients of an offense, and no omission, in such statements, can be supplied by innuendo or evidence." *State v. Henderson*, 1 Rich. 184. "In setting out an offense against a statute, the defendant must be brought within all the material words of the statute, and nothing can be taken by intendment." *State v. O'Bannon*, 1 Bailey 144.

---

April Term, 1882.

---

It is true that it is not necessary to set out the very words of the statute; but, according to these principles as to the particularity required in criminal proceedings, we do not think that the indictment was sufficient under the statute, which is as follows: "With respect to the crimes of burglary or arson, and to all criminal offenses, which are constituted or aggravated by being committed in a dwelling-house, any house, out-house, apartment, building, erection, shed or box, in which there sleeps, &c., \* \* \* shall be deemed a dwelling-house; and of such a dwelling-house, and of any other dwelling-house, *all houses, out-houses, buildings, sheds and erections, which are within two hundred yards of it, and are appurtenant to it*, or to the same establishment of which it is an appurtenance, shall be deemed parcels." *Gen. Stat. 1882, § 2483.*

This statute was intended to enlarge the field within which burglary could be committed, but in doing so it required two things as essentially necessary to constitute the new statutory offense; the out-house in which the offense is committed must be within two hundred yards of the dwelling-house and appurtenant to it. Neither of those ingredients of crime were alleged in this indictment, and, therefore, it was not good under the statute. The indictment containing no such allegations, proof upon these points was inadmissible.

But it is insisted that the terms of the indictment, even if not full enough under the statute, are sufficient to sustain a conviction for burglary at common law, inasmuch as it charges the offense to have been committed "in a gin-house situate within the curtilage of the dwelling-house," which fulfills the definition of burglary at common law, viz., "the breaking and entering the dwelling-house of another, &c., and the term dwelling-house includes all out-houses contiguous to the dwelling and parcel thereof, if within the curtilage." *State v. Sampson, 12 S. C. 567.*

This court has held that the act of 1866, re-enacted in the general statutes, enlarged the limits within which burglary might be committed, but did not repeal the common law offense, and also that it was not repealed by the act of 1878, which increased its punishment. *State v. Branham, 13 S. C. 389.*

---

Opinion of the Court.

---

But it may be a question whether the statute, which does not use the word "curtilage" at all, and seemingly in lieu thereof made a new provision as to burglary, so far as out-houses are concerned (in requiring that they must be within two hundred yards of the dwelling-house and appurtenant thereto) did not repeal as inconsistent with that provision so much of the common law offense as relates to "curtilage," or to out-houses which may or may not fall within it, leaving the common law offense of burglary still in existence, but limited to the single case of being committed in the dwelling-house. This question was suggested, but not argued before us, and we make now no ruling on it.

Assuming that the common law offense still exists unimpaired as to out-houses within the curtilage, as it did prior to the act of 1866, and this could be considered as an indictment under it, the indictment does not charge that the gin-house was "contiguous" to and "parcel" of the dwelling-house, only that it "was situate within the curtilage of the dwelling-house," making it necessary to institute the inquiry, whether a gin-house eighty yards from the dwelling-house, and used for ginning cotton and sheltering stock, was within the curtilage, a term which, although often defined, seems still to lack certainty. It was long ago held in this State that "a house to be parcel of the mansion-house, must be somehow connected with or contributory to it, such as a kitchen, smoke-house or such other as is usually considered as a necessary appendage of a dwelling-house. It cannot embrace a store, blacksmith shop, or any other building separate from it and appropriated to another and a distinct use." *State v. Ginns*, 1 N. & McC. 585.

It is not necessary in this case, however, to make any such inquiry. The case was tried as one under the statute. Judge Aldrich reports that "it was an indictment under the statutory provision punishing as burglary the breaking and entering any house within two hundred yards of the dwelling-house and appurtenant thereto," and the punishment imposed—three years in the penitentiary—shows conclusively that he so regarded it; for if the defendant had been convicted of burglary at the common law, the punishment, under the statute of 1878, could not

---

April Term, 1882.

---

have been less than imprisonment "in the penitentiary with hard labor during the whole life of the prisoner." The defendant having been tried for the offense of burglary under the statute, and never having had an opportunity to defend himself as against the common law offense, the conviction, not sustained under the former, cannot be referred to the indictment as sufficiently charging the latter offense. As we understand it, burglary at common law is a different offense from burglary under the statute, is considered of higher grade and is punished much more severely.

The judgment of this court is that the judgment of the Circuit Court be reversed and the judgment arrested.

---

## MILLER v. HALL.

1. A finding of fact by one of two referees concurred in by the Circuit judge, affirmed.
  2. A bond executed January 1st, 1873, conditioned for the payment "of \$1,195 in five equal annual installments, with interest payable annually from date upon the whole amount unpaid and at the rate of ten per centum per annum, the first installment payable January 1st, 1874, being \$239, besides interest, and the last installment of like amount on January 1st, 1878, and the same amount with all interest due, payable on the first day of January of each intervening year," bears annual interest at the rate of ten per cent. a year after maturity of the last installment as well as before.
- 

Before KERSHAW, J., Abbeville, February, 1881.

Hon. Thomas B. Fraser, judge of the Third Circuit, sat in the place of Mr. Justice McGowan, who had been of counsel in the cause.

It was an action by Jacob Miller against Wiley Hall, commenced in March, 1879, for a specific performance of the bond recited in the opinion of this court, or for a sale of the land. The covenant referred to in the opinion was as follows:

Agreement and covenant this day entered into between Jacob Miller and Wiley Hall, both of the county and State aforesaid.

---

Statement of the Case.

---

*First.* Jacob Miller agrees to sell to said Wiley Hall two hundred and thirty-nine acres of land according to metes and bounds of a plat thereof made by Jas. A. McCord, Esq., deputy surveyor, which, when finished, is to be attached to this agreement; at and for the price of five dollars per acre, making in the aggregate the sum of one thousand one hundred and ninety-five (\$1,195) dollars, for which sum the said Wiley Hall has this day executed to the said Miller a penal bond, payable in five annual equal installments with interest from date at ten per centum and payable annually. The said Jacob Miller to retain the title to the said land until the whole of the said bond for the purchase money and interest thereon is paid in full. Then good titles to be made to the said tract of land.

*Second.* Wiley Hall agrees to pay five dollars per acre for the said tract of land, making the sum of one thousand one hundred and ninety-five (\$1,195) dollars, for which he has this day executed a bond with interest at ten per centum payable annually, the said bond payable in five equal annual installments. The said Wiley Hall agrees to enter upon the said premises without titles and after payment of the said bond in full, then, and not till then, to receive titles to the said tract of land.

Witness our hands and seals this the first day of Jan., 1873.

The cause was referred to O. T. Calhoun and M. P. De Bruhl, Esqs., as referees. Referee Calhoun reported in favor of a credit of \$60 claimed by defendant to have been paid January 1st, 1874, and that the bond bore simple interest at seven per cent. after maturity, and found the balance due by defendant to plaintiff on September 1st, 1879, to be \$555.94. Referee De Bruhl found the balance on the same day to be \$666.81, he having disallowed the alleged credit of \$60, and having calculated interest after the maturity of the bond at ten per cent., payable annually. The cause came up for a hearing on exceptions to this report, and the Circuit judge filed the following decree:

This case was heard upon the reports of two referees, who differed in opinion and made separate reports, to both of which exceptions were filed. The referees do not differ in their findings of fact, except in the item of the credit for \$60 claimed by the defendant. It appears to me that the weight of the evidence is against this credit, and as to that I concur with Mr. De Bruhl in rejecting it.

The main question in the case is as to the mode of calculating

---

April Term, 1882.

---

the interest. The principle of construction on this question is explained in *Langston v. South Carolina Railroad Company*, 2 S. C. 248. The legal rate applies unless displaced by the positive terms of the contract, and yields only so far as it is thus excluded. The interest was to be "at the rate of ten per centum per annum, to be payable annually, from date, upon the whole amount unpaid, the first installment (\$239), besides interest, payable on January 1st, 1874, and the last installment of like amount, on January 1st, 1878, and the same amount, with all interest due, payable on the first day of January of each intervening year." This statement of the bond presents the two questions made upon its construction, first as to how far the rate of ten per cent. is to be applied to it; and next, whether annual interest is to be allowed after the maturity of the bond.

1. I consider that the rate of ten per cent. was established by the contract, not only for the detention of the principal sums due, but also for the detention of the interest when not paid each year. The rate applied to the "whole amount unpaid," and those words require this construction.

2. So also do they qualify the requirement in regard to payment of the interest annually. The interest was to be "payable annually, from date, upon the whole amount unpaid." This construction is supported by the decision of the Court of Errors in *Wright v. Eaves*, 10 Rich. Eq. 584, and would be in accordance with that case even without the words in the bond, "upon the whole amount unpaid," which seem to me to be conclusive, and to require that the interest be calculated with annual rests upon the whole amount unpaid, after, as well as before, the last payment became due. The bond in *Wright v. Eaves* was without those words, but in other respects very like this, and the Court of Errors decided that the interest was payable annually after, as well as before, maturity, thereby reversing the Circuit decree to that extent.

The report of Mr. De Bruhl does not contain a statement of his calculation of the interest, whereby its accuracy might be tested and his mode of calculating the same exemplified, and a further reference will be necessary. It is ordered and adjudged that the reports herein be so modified as to conform to the prin-



---

Opinion of the Court.

---

ciples of this decree, and that the exceptions which accord therewith be sustained, and the other exceptions be overruled. That it be referred to the master to ascertain and report the amount due upon the bond aforesaid, in accordance with the said reports, as modified by this decree.

Defendant appealed on the following exceptions:

1. Because his Honor erred in overruling defendant's exceptions to the report of M. P. De Bruhl, Esq., one of the referees.

2. Because his Honor erred in overruling defendant's exceptions to the report of O. T. Calhoun, Esq., the other referee.

3. Because his Honor erred in sustaining plaintiff's exceptions to the said report of O. T. Calhoun, Esq.

4. Because there is a patent ambiguity upon the face of the two bonds, and his Honor erred in not giving them that construction which is most agreeable to the rules of law, instead of the contrary.

5. Because his Honor erred in allowing interest at the rate of ten per centum per annum on the bond in suit from its date to the date of the referee's report, and also in allowing compound interest on the said bond at the rate aforesaid, instead of computing annual interest from the date of said bond upon each installment thereof, until it became payable, at the rate of ten per centum per annum, and simple interest upon each installment thereof after it became payable, and upon each installment of interest that was payable annually, according to the terms of said bond, at the rate of seven per centum per annum.

6. Because his Honor erred in making the report of M. P. De Bruhl, Esq., the judgment of the Court.

7. Because the said judgment is contrary to the law of the case and the evidence adduced therein.

*Messrs. Burt & Graydon*, for appellant.

*Mr. W. H. Parker*, contra.

October 21st, 1882. The opinion of the court was delivered by

MR. JUSTICE FRASER. On January 1st, 1873, the appellant executed his bond to the respondent, the condition of which was

---

April Term, 1882.

---

the payment "of one thousand one hundred and ninety-five dollars (\$1,195) in five equal annual installments, with interest payable annually from date upon the whole amount unpaid, and at the rate of ten per centum per annum. The first installment payable on the first day of January, one thousand eight hundred and seventy-four, being two hundred and thirty-nine dollars (\$239), besides interest, and the last installment of like amount on the first day of January, one thousand eight hundred and seventy-eight, and the same amount, with all interest due, payable on the first day of January of each intervening year." On the same day and year the said parties entered into a written agreement, under seal, that the respondent would convey to the appellant a certain tract of land upon the payment of the above described bond, which appellant thereby again covenants to pay.

After various payments were made a dispute arose as to some alleged payments and as to the mode of calculating interest on the bond, and this action was brought for specific performance or sale of the land. The burden of proof as to the alleged payments was certainly on the appellant, and this court concurs with the Circuit judge that the weight of evidence is against the credit claimed for sixty dollars, and that it was properly disallowed.

The only other question presented to this court by the appeal is as to the mode of calculating interest, and it is conceded that this must be governed by the contract between the parties.

In the case of *Mobley v. Davega*, 16 S. C. 73, there was a note "with interest from date at twelve and a half per cent. per annum, interest payable annually," and the mortgage contained the further words, "till paid," and the court held that interest was payable annually as well after as before maturity. The words here are "interest payable annually from date upon the whole amount unpaid, at the rate of ten per centum per annum." The words "till paid," it is held, will carry the interest agreed on beyond the period of maturity of the payments. The words "whole amount unpaid" cannot certainly refer to amounts not paid before maturity, because the rate as to this is fixed by the other words in the bond, and the word "unpaid" is more properly

---

Dissenting Opinion.

---

applicable to the amounts not paid when due, and which the obligor was then bound to pay, and which he had no right to pay before.

It does not appear to this court that there is any good reason for applying the term "unpaid" as used in this bond to any portion of the principal or interest, which, if tendered, the obligee had a right to refuse. The words must have some meaning, and their clear import is that any amounts not paid when due according to the condition of the bond, continues to bear interest at the rate of ten per centum per annum, payable annually, until the bond is paid up. This is the contract of the parties.

The court therefore concurs with the Circuit judge as to the mode of calculating interest on the bond. The reports of the two referees have been recommitted by the Circuit judge to the master "to ascertain and report the amount due upon the bond aforesaid in accordance with said reports as modified" by the Circuit decree, and upon the coming in of the master's report a final decree can be made on the Circuit.

It is therefore ordered and adjudged that the exceptions be overruled, the judgment of the Circuit Court affirmed, and the appeal dismissed.

MR. JUSTICE McIVER concurred.

MR. CHIEF JUSTICE SIMPSON, *dissenting*. Where annual interest is agreed to be paid on money foreborne, the general rule is that it stops at the maturity of the principal sum. It is not illegal, however, for a party to contract to pay annual interest after the maturity of the principal sum, as well as before, so that in every case, where the question arises whether annual interest should be computed after the maturity of the principal sum, it must be decided upon the construction of the contract. The true meaning and intent of the parties as derived from the terms of the instrument must be inquired into, and, when ascertained, will govern. See appendix to *Johnstone's Digest*, where the cases on this subject are collected and analyzed.

It has been decided that where a certain sum has been promised at twelve months, or any shorter period after date, with

---

April Term, 1882.

---

interest, payable annually, that this is a contract to pay the interest annually, after the maturity as well as before. This is inferred from the word "annually," as there could be no other purpose in using this word, but to convey the idea that the interest was to be paid at the end of each year, till the debt was paid. *Singleton v. Lewis*, 2 Hill 408; *O'Neill v. Bookman*, 9 Rich. 80.

It has also been decided, that where a principal sum is promised at two or more years after date, with interest from date, payable annually, that the obligation of the debtor to pay annual interest stops at the maturity of the debt, because the term "annually" is satisfied by such a construction, the promise of the debtor being to pay the principal sum at the end of the two or more years, with the interest of each intervening year as it accrues, which, not being paid, would bear interest as these amounts fell due, respectively, as if a note had been given for these unpaid annual interests at the end of each intervening year. *Gibbes v. Chisolm*, 2 N. & McC. 38; *O'Neill v. Sims*, 1 Strobh. 115; *DeBruhl v. Neuffer*, Id. 426.

But where the promise is to pay a principal sum at the end of two or more years, with interest payable annually "till the whole debt is paid," these words, or any of similar import, would require the party to pay annual interest after the maturity as well as before, because such is the plain meaning of the contract, the promise of its terms being to pay the debt at a fixed time and also annual interest on it, not as in the former case up to that time, but continually until the whole debt is paid. Thus, as has already been said, each contract depends upon its own terms, the question in every case being what was the understanding of the parties as expressed in the instrument under consideration.

Now apply these principles to the case before the court. Here the appellant gives bond that he would pay the respondent \$1,195, in five equal annual installments from date, with annual interest on this sum. Suppose that the bond had stopped at this point, could the instrument be construed otherwise than that the appellant promised to pay the principal debt within five years, and also the annual interest that might accrue thereon

---

Dissenting Opinion.

---

within that time? Could it be said that he had promised to pay annual interest after the five years? I think not, because the bond, as to all of the installments, would mature at the end of the five years, and while there is a promise to pay the interest on each installment at the end of each intervening year, there is nothing which shows that he was to pay the annual interest after the five years.

The bond in question, however, does not stop at this point; it provides further, "that the interest is to be paid annually on the whole amount unpaid," and the majority of the court has reached the conclusion that this term "unpaid" has the same effect as if the term "till paid" had been employed. It is conceded that if these latter terms had been used, this would carry the annual interest to the ultimate payment of the whole debt, because such would have been the distinct promise of the debtor. But, as I understand the case, the term "unpaid" was not used by the parties here synonymously with "till paid." Look at the bond. Its evident purpose was to bind the appellant to pay the respondent \$1,195, the price of a certain tract of land. The appellant was to have five years to pay this sum as a whole, to be paid, however, in installments of one-fifth annually, the whole amount to be realized in five years, at the end of which time the ultimate maturity of the bond as a whole was to take place.

Now it was uncertain whether each installment would be met at the period of its special maturity. It was not known but what some of them, though falling due within the five years, might remain unpaid up to that time, and no doubt the term "unpaid" was employed to denote that if any of these installments were unpaid as they fell due, they should still carry annual interest up to the ultimate maturity of the bond as a whole, and not beyond the five years as held by the majority, the term "unpaid" having reference to the different installments, but within the five years. And this is the more reasonable when it is remembered that it is by no means certain, if this term had not been used, that the annual interest could have been carried beyond the maturity of each installment.

There is some doubt whether, in the absence of this term, the

---

April Term, 1882.

---

bond might not have been construed as containing five different obligations, falling due at one, two, three, four and five years, with annual interest on each, consecutively, in which case, under our decisions, the first bond being due at one year, with interest payable annually, this term, by its own force, would carry the annual interest until the installment was paid. The other four installments, however, falling due at longer dates than one year, would be governed by the other decisions, which hold that the annual interest stops as the debts become due. The term "unpaid" prevents this as to all of the installments and requires the annual interest to run on upon each, though not paid when due—not indefinitely, however, but until the expiration of the five years, when the whole bond was expected to be satisfied. The limit of the contract, as a whole, was five years, and the intervening stipulations had reference to that period.

Under this theory, the interest on the bond in question should have been computed annually on all installments remaining unpaid from the date of the bond for five years, at the rate specified in the bond; after that time the annual interest to cease and the regular legal interest to attach upon the whole. Differing, as I do, in this construction from the Circuit judge who heard the case, and from the majority of this court, no doubt I am in error; but I have been unable to see the case as my brethren have. Hence this dissenting opinion.

Judgment affirmed.

---

STATE v. SMITH.

Where several distinct offenses are charged in different counts of an indictment, all growing out of the same act or acts, even though subject to different punishments, a general verdict of guilty furnishes no ground for a motion in arrest of judgment or for new trial, provided the jury have been explicitly instructed as to the form and effect of their verdict.

---

Before ALDRICH, J., Anderson, February, 1882.

---

Opinion of the Court.

---

This was a prosecution against Sherman Smith and four other defendants. The opinion fully states the case.

*Mr. W. C. Benet*, for appellants.

*Mr. Solicitor Orr*, contra.

October 25th, 1882. The opinion of the court was delivered by

MR. JUSTICE McIVER. The indictment in this case contains three counts. The first charges that the defendants "did unlawfully, willfully and maliciously and feloniously set fire to the county jail;" the second, that they "did unlawfully, willfully, maliciously and feloniously set fire to the dwelling-house of James H. McConnell;" and the third, that the defendants "did willfully, unlawfully and maliciously mutilate, deface and injure the house, that is to say, the jail of Anderson county, upon real estate in the possession of James H. McConnell." The first two counts, therefore, charge a felony, and the third a misdemeanor.

The Circuit judge, in his charge to the jury, explained the different counts and the effect of a verdict on them, saying: "If they found the prisoners guilty of arson—defining it—they should find them guilty generally; if they did not find them guilty of arson, but of malicious injury, they should write, 'not guilty as to the first and second counts, guilty as to the third count.' If they should find them not guilty of any of the counts, they should say, 'not guilty.' That if they found the prisoners guilty, they could recommend them to mercy." The jury returned a general verdict of guilty, with a recommendation to mercy, whereupon the defendants made a motion in arrest of judgment and for a new trial upon two grounds, which being refused, they now, by this appeal, renew these motions upon the same grounds. As the second ground was abandoned at the argument in this court, it will only be necessary to state the first, which is as follows: "Because his Honor erred in holding that the verdict of guilty, generally, upon an indictment containing a charge of felony, and a count in the same indictment charging a misdemeanor, when the penalties were different, was not a ground for a new trial."

---

April Term, 1882.

---

It must be conceded that it is somewhat difficult to reconcile the decisions in this State upon the point presented by this appeal, and we simply propose, after reviewing the cases, to deduce from them what we understand to be the rule upon this subject.

In *State v. Montague*, 2 McC. 257, the indictment was for a misdemeanor, and contained two counts, but what those two counts were does not appear. All that is said upon this branch of the case is: "There are two distinct counts in the indictment, each charging the prisoner with a different and distinct offense, for each of which offenses the law has provided a different and distinct punishment. A general verdict of guilty does not show of which offense he was guilty. The judgment of the court, therefore, cannot be pronounced." A new trial was accordingly granted. In the opinion no authority is cited and no reasoning employed except what has just been quoted. It does not appear that the jury were instructed so to shape their verdict as to indicate which of the two offenses they believed the party charged to be guilty of, nor as to the effect of a general verdict.

In *State v. Crank*, 2 Bail. 66, the defendant was indicted for murder. In the first count he was charged with having struck the mortal blow, in the second with having been present aiding and abetting another who struck the mortal blow, in the third and fourth he was similarly charged, only varying the name of the person charged with striking the mortal blow, and in the fifth count he was charged as accessory before the fact. There was a general verdict of guilty, and one of the grounds of the motion in arrest of judgment was, that, under a general verdict upon such an indictment, no judgment could be pronounced, as the court could not know whether the intention of the jury was to find the prisoner guilty of murder in the first or second degree, or of being an accessory before the fact. The court held that the motion could not be sustained, saying: "If, therefore, several felonies of the same degree be included in the same indictment and there is a general verdict, judgment may be given on any or all of them, according as they may have been supported by the proof." It will be observed that the material difference between *Crank's* case and the foregoing one is that in the latter case the



---

Opinion of the Court.

---

punishment was the same under all of the counts, while in *Montague's* case it was different.

In *State v. Priestex*, Cheves 103, Judge Earle, in delivering the opinion of the court, lays down this doctrine, that two distinct offenses with different penalties may be embraced in the same indictment; "but," he adds, "care must be taken to have the verdict framed so as to secure the several counts." This, however, is a mere *dictum*, inasmuch as in that case the indictment was for unlawfully trading with a slave under the act of 1817, and in one count the defendant was charged with buying corn from a slave, and in the other with selling liquor to the same slave, it being all the same transaction, the liquor having been delivered to the slave in exchange for the corn. And upon a general verdict, the court, on a motion in arrest of judgment, held that there was no misjoinder of two offenses, but that it was the same offense charged in different forms.

In *State v. Anderson*, 1 *Strob.* 455, the indictment contained two counts, one, under the act of 1834, charging the defendant, as a vendor of spirituous liquors, with delivering liquor to a slave; the other, under the act of 1817, charging the defendant with unlawfully trading with a slave, both charges growing out of the same transaction. There was a general verdict, and the defendant moved in arrest of judgment and for a new trial on the ground, *inter alia*, that no judgment could be rendered upon such a verdict where the indictment contained two counts, charging different and distinct offenses and punishable differently. The court held that while this afforded no ground for arresting the judgment, yet it did furnish good ground for a new trial, and granted that motion. The reason given seems to have been that, while different offenses might be joined in the same indictment, though not in the same count, yet, on a general verdict, the court would not know on which count to pass sentence. In this case, also, it does not appear that the jury were instructed as to the effect of a general verdict, or that they could so shape their verdict as to indicate what offense they thought the defendant guilty of. Inasmuch as it appeared in this case that the count under the act of 1817 was fatally defective, it is difficult to understand how the court could have reached the result which

---

April Term, 1882.

---

they did, in the face of the decision in the *State v. Poole*, 2 *Tread. Con. Rep.* 494, which, in that very case, it is said has been followed ever since. See *State v. Pace*, 9 *Rich.* 355, where it was held that a general verdict upon an indictment containing two counts, one of which was so defective as not to warrant any judgment upon it, would be sustained and referred to the good count.

In *State v. Tidwell*, 5 *Strob.* 1, the defendants were indicted for abduction under the act of 4 & 5 P. & M. ch. 8. The indictment contained four counts. The first, framed under the third section of the act, charged both of the defendants with abducting the girl from the possession of her father; the second, framed under the fourth section of the act, charged that both abducted the girl and that Tidwell married her; the third was like the first count, except that it contained the additional averment that the girl was an heir apparent of her father, and the fourth was similar to the second count, with the additional averment contained in the third. The punishment imposed by the fourth section of the act was greater than under the third section. The jury rendered a general verdict of guilty and the defendants moved in arrest of judgment because the indictment charged two distinct offenses, admitting of different degrees of punishment, and a general verdict of guilty did not show of which offense the jury intended to find the parties guilty. The court held that this furnished no ground for a *motion in arrest of judgment*. Whether it would support a *motion for a new trial* does not seem to have been distinctly considered, though the intimation is that it would not in that particular case, inasmuch as the offenses charged were of the same general nature, and the aggravation alleged in one of the counts, while it increased the penalty, could be regarded as embracing the other, and therefore a general verdict should be regarded as having found the highest degree of guilt.

In *State v. Posey*, 7 *Rich.* 484, the indictment contained four counts for grand larceny and two for receiving stolen goods, one under the statute and the other at common law, both being misdemeanors. The jury found the defendant guilty of "receiving stolen goods, knowing them to be stolen." A motion in arrest

---

Opinion of the Court.

---

of judgment was made, upon the ground that it did not appear from the verdict upon which count the finding rests. The court said that after the verdict, the indictment must be regarded as containing only the two counts charging the offense of receiving stolen goods, and held that there was no ground for the motion in arrest of judgment. Although there was no motion for a new trial based upon this ground, yet the court, for the benefit of the defendant, treated it as such a motion, and held that though the uncertainty as to which count the verdict referred to might be a good ground for a new trial, if one count was good and the other bad, or the punishment under the two counts were different in kind, yet in this case there was no such uncertainty, and that even if the sixth count was bad, the verdict might be referred to the fifth, as the offenses charged were of the same general nature, and it was at least doubtful whether there was any difference in the punishment. Accordingly the motion was refused.

In *State v. Major*, 14 Rich. 76, the indictment contained three counts. In the first the three defendants were charged with stealing a colt; in the second, Warren and Hiram Major were charged with the same offense, and Daniel Major was charged as accessory before the fact; and in the third count, all three were charged with a misdemeanor, in receiving the colt knowing it to be stolen. The jury found the following verdict: "Warren T. Major and Hiram Major, guilty; Daniel Major, guilty of petit larceny." One of the questions raised on a motion for a new trial was, whether any judgment could be pronounced upon this verdict. The court held that the offenses charged being distinct and different, and subject to different punishments, there was no means of determining from the verdict of what offense the parties were guilty, and hence no means of ascertaining what punishment should be imposed. The court drew a distinction between this case and that of "the case of a general verdict on an indictment containing several counts, charging offenses of the same general nature, but different degrees, where each higher necessarily includes all the lower grades, distinguished from them by an aggravation of guilt and a corresponding increase in the measure, but not variation in the kind, of penalty, and where the less offense being merged in the greater, the general verdict shall be

---

April Term, 1882.

---

taken to have found the highest grade, if the proof be applicable to it," as in *Tidwell's Case*, *supra*; and said it was rather a case where distinct offenses are charged, for each of which the law prescribes a different and distinct punishment, and that a general verdict not showing of which offense the parties have been found guilty, the court cannot know what judgment to pronounce, as in *Montague's Case*, *supra*. It will be observed that in this case it does not appear that any instructions were given to the jury as to the form in which they might find their verdict, or as to the effect of a general verdict.

In *State v. Nelson*, 14 *Rich.* 169, the indictment contained three counts: The first charging burglary; the second charging another burglary at a different time and place from the first; and the third charging larceny, at the same time and place mentioned in the second count; the alleged value of the property stolen being under \$20. So that the case presented was one in which two distinct felonies and a misdemeanor were charged in different counts of the same indictment; the misdemeanor charged growing out of the same transaction as that upon which the second felony charged rested, with a general verdict of guilty. Upon a motion in arrest of judgment, which the court treated as a motion for a new trial, the rule was laid down in the following language: "Where an indictment charges the same transaction in one count as a felony, and in another as a misdemeanor of such nature that the latter is, or may be, included in the former, it is merged in it, if the higher offense has been consummated; and the jury, even if there were no charge of the less offense in a separate count, might convict of this under the count for the greater, if the evidence, in their judgment, warranted no more. A general verdict is understood to find the higher offense if there is testimony to support it; and the finding of such verdict is not a ground for a new trial even. It is proper, however, that the jury should be distinctly instructed as to the effect of their general finding in such case, and that they are at liberty to distinguish, and, according to their views of the evidence, convict on the one count or the other; and it is more satisfactory that they should do this."

---

Opinion of the Court.

---

In *State v. Scott*, 15 S. C. 434, the rule, as laid down in *Nelson's Case*, has been recently affirmed by this court.

From this review of our cases, we think that the rule to be extracted from them is, that where several distinct offenses are charged in different counts of an indictment, all growing out of the same act or acts, even though subject to different punishments, a general verdict of guilty furnishes no ground for a motion in arrest of judgment, and no ground for a new trial, provided the jury have been explicitly instructed that the effect of a general verdict will be to find the party accused guilty of the highest offense charged in the indictment, and that they have the right to designate in their verdict which one of the particular offenses charged they believe the accused to be guilty of.

In the case now before the court, it is conceded that both of the offenses charged in the indictment grew out of the same act; and it appears that the jury were very explicitly instructed how to shape their verdict so as to show distinctly of what particular offense they believed the parties guilty. For the Circuit judge, after explaining what constituted arson, told the jury that if they believed the parties guilty of that offense, their verdict should be guilty generally; but if they did not believe the defendants guilty of arson, but only guilty of malicious injury, then their verdict should be not guilty as to the first and second counts, but guilty on the third count; and if they did not believe them guilty of either of the offenses charged, their verdict should be not guilty. It seems to us, after such instructions, a general verdict of guilty leaves no more doubt as to the offense of which the jury intended to convict the defendants than if their verdict had been guilty of arson, or guilty on the first or second counts.

The judgment of this court is that the judgment below be affirmed.

---

April Term, 1882.

---

## HIRSHKIND &amp; CO. v. ISRAEL.

1. Concurrent finding of fact by master and Circuit judge affirmed.
2. A chattel mortgage is not, as matter of law, fraudulent and void, because that it covers also "such goods, wares and merchandise as may from time to time hereafter be acquired in lieu and place thereof in the current business of the said mercantile establishment."
3. A second mortgagee of a stock of goods cannot resist the lien of a former mortgage of such stock upon additions subsequent to the date of the first mortgage and covered by its terms, without showing that such additions were made after the execution of the second mortgage.
4. While a second mortgage might be preferred to advances made under a former mortgage after the execution of the second, a first mortgage on a stock of merchandise for an existing debt may cover subsequently purchased goods, and the lien will attach as they are acquired.

---

Before COTHRAN, J., Richland, November, 1881.

Action by Hirshkind & Co. against Morris Israel, Charles Elias and Jesse E. Dent, sheriff, commenced February 14th, 1879. Afterwards, on motion, certain attaching creditors of Charles Elias were made parties defendant. The case is fully stated in the Circuit decree.

The master, N. B. Barnwell, Esq., to whom all the issues were referred, reported that there was no fraudulent intent on the part of Israel, and that the terms of the mortgage did not constitute fraud in law. Upon the first ground, his findings were as follows:

In support of the first ground a great deal of testimony was taken, in which the validity of the loan, by Israel to Elias, was sought to be impeached, and an effort was made to show that from the conduct of the defendants, Elias and Morris Israel, an inference of the fraudulent nature of the transaction necessarily arose. In my opinion, the facts do not sustain this view, and I find that the transaction between Elias and Morris Israel, at least so far as the latter is concerned, is entirely free from any fraud in fact, and that the debts secured by the mortgage were *bona fide* transactions, and the mortgage given to secure the same was

---

Statement of the Case.

---

not, as a matter of fact, made with any fraudulent intent, nor for the purpose of delaying or hindering the creditors of Charles Elias.

It is clear that at the time of the transaction, *i. e.*, the execution of the mortgage, the defendant Charles Elias was insolvent, but there is no proof that this fact was known to Morris Israel. Prior to that time the credit of Elias was good; he had before borrowed large amounts from the defendant Israel, and repaid them, and, so far as the evidence shows, this mortgage was in fact intended by Israel to operate entirely as a security for his debt, and in no respect whatever does he appear to have contemplated the use of his mortgage as a cover against other creditors. There is no proof of any collusion to that end, in any of the conduct of Israel. The mortgage had a short time to run, it was left with the notes in the hands of the attorneys of Israel, with instructions to enforce the mortgage promptly upon the non-payment of the notes. It is true some delay did occur, but this appears to have been due to the solicitations of Elias, addressed to the attorneys of Israel.

Much testimony was taken in reference to the disposition made by Elias of the money borrowed from Israel, but I cannot see that this has any bearing upon Israel's mortgage, except in so far as it was supposed to discredit the claim of Israel to be a creditor of Elias for the amount alleged to be due him, and for this purpose it was, in my opinion, entirely insufficient; for it must be clear, and in order that this conveyance be set aside for fraud, the fraudulent purpose must be shown to have been shared in both by grantor and grantee.

What right have we then to infer a fraud against the grantee here from the conduct of Elias? The defendant Israel testifies that at the outset of this transaction, considering Elias as perfectly solvent and in good credit, he made no inquiry as to his liabilities, had no information on this point. He simply examined the value of his stock of goods, estimated them at \$7,000, and took the mortgage, under the impression that at that time there was an ample amount of property to secure him, and in this view the facts would seem to have borne him out, for when, at the time of the seizure of the property, an inventory was

---

April Term, 1882.

---

made, being two months after the date of his mortgage, the value of the stock at its cost price in New York was over \$5,000.

At the trial before me, the fact that, at the sale of the property, which took place before the trial, Israel became the purchaser of a very large portion of it, sold out his share of the purchases to Mrs. Eva Elias, the wife of Charles Elias, and that she subsequently carried on the business, was alleged as bearing upon this question. If this had been done in pursuance of any agreement or understanding between Israel and Elias at the time of the execution of the mortgage, the indirect benefit resulting to Elias' family might have some weight in vitiating the mortgage; but I see nothing in the mortgage to indicate any such agreement. I do not think, therefore, that this is entitled to any weight in determining the question as to any actual intent on the part of Israel to permit his mortgage to be used to delay, hinder, or defraud the creditors of Elias.

The Circuit decree was as follows:

This is an action brought by the plaintiffs, as mortgagees of a stock of merchandise, the property of the defendant Elias, *mainly*, for the purpose of setting aside, on the ground of fraud, a senior mortgage of the same stock of merchandise given by the said Elias to his co-defendant Israel.

The matter was submitted by consent of counsel upon written arguments; and although I have cause to regret their actual absence, that has been compensated, as far as it could properly be, by the submission of very learned and exhaustive arguments. By an order of the late Judge Thomson, made in this court on April 25th, 1879, it was referred to the master to hear and determine all the issues in this action and report to this court his findings and conclusions, together with the evidence. Pursuant to this order, the master, on June 6th, 1879, began to hold the series of references duly noted in the mass of testimony taken by him, and on July 11th, 1879, made up his report adversely to the plaintiffs upon all the issues made in this cause. To this report the plaintiffs, by their counsel, have filed sixteen exceptions, which will be considered and determined after making a brief statement of the case.



## Circuit Decree.

The defendant, Charles Elias, during the year 1878, and for a year or so previously to that time, was a merchant, doing business as such in the city of Columbia. Before that time, whilst merchandising in Camden, he had some moneyed transactions with the defendant Israel, who, it appears, was engaged in the brokerage business (lending money) in the city of Charleston. These were promptly and fully adjusted by Elias, and Israel's confidence thereby secured.

In the fall of the year 1878, Elias applied by letter to Israel for further pecuniary aid, and was invited to Charleston by the latter with favorable assurance. He went accordingly, and then executed the first note for \$1,000, dated October 4th, 1878, at seventy days, due December 13th, 1878; second note for \$500, dated November 11th, 1878, at thirty days, due December 11th, 1878; third note for \$500, dated December 12th, 1878, at ten days, due December 22d, 1878. The last note was made and delivered in Columbia, Israel having gone there on account of these repeated demands for aid, and, as he says in his testimony, "feeling a little uneasy."

Before Israel would consent to make the last loan, he required Elias to give some security for the \$1,500 already loaned, and after "some consultation and dilly-dallying" (in the words of the defendant Israel), and examination of the stock of merchandise, Elias reluctantly consented to give the mortgage, the subject of this contention. The mortgage is of the stock of merchandise then in the store of Elias, and using the words of the instrument, "as well said stock now in the said establishment, as such goods, wares, and merchandise as may from time to time hereafter be acquired in lieu and place thereof in the current business of the said mercantile establishment," embracing in the *tenendum* of the deed the property "after acquired as aforesaid," and to secure the sum of the three notes, viz., \$2,000. This mortgage was executed December 12th, 1878, and recorded in register's office on December 24th, 1878.

The plaintiffs' transaction with Elias bears date January 10th, 1879, a little more than two weeks after Israel's mortgage was recorded in the register's office, and is evidenced by a note for the sum of \$332.50, secured by mortgage of equal date, of the

---

April Term, 1882.

---

stock of merchandise then in the store of the said Elias; this mortgage was recorded January 24th, 1879.

On the 3d day of February following, ten days after plaintiffs' mortgage was recorded, Israel duly appointed J. E. Dent, then sheriff of Richland county, as his agent to seize and sell the said mortgaged property, and on February 10th the seizure was made and Dent took possession of the entire stock. On February 14th, four days after the seizure by Dent, the plaintiffs began this action, and on February 26th, by agreement of all the parties interested, the sale by Dent was allowed to be made, and this contention is over the proceeds of the sale of the mortgaged property.

EXCEPTIONS TO THE REPORT.—I agree with the learned counsel for the plaintiffs, that the numerous exceptions to the master's report may be substantially expressed in two propositions, viz.: 1. That the evidence adduced shows with reasonable certainty that the mortgage to Israel was executed with the intent to hinder, delay and defeat the other creditors of the mortgagor, Elias. 2. That the said mortgage is void by presumption of law, because such fraudulent intent is apparent upon its very face.

*As to the First Proposition.*—In these issues the plaintiffs have taken the affirmative, and it is a well established rule of evidence that he who alleges must prove. The charge of fraud is almost criminal, and in the case of obtaining goods under false pretenses, which is a species of fraud, is punished criminally. Still the rule of "proof beyond a reasonable doubt," is not required of the plaintiffs here; nevertheless on account of the very nature of the charge, it does not admit of any relaxation of that other rule, that the charge should be established by the clear preponderance of the evidence. Upon a careful review of the testimony, as reported, I do not find that *clear* preponderance, and I shall therefore dispose of the first proposition herein, by stating my concurrence in the conclusion reached by the master (for the reasons so well stated by him, and for others perhaps, which might be given), who has found "that the transaction between Elias and Morris Israel, at least so far as the latter is

## Circuit Decree.

concerned, is entirely free from any fraud in fact, and that the debts secured by the mortgage were *bona fide* transactions, and the mortgage given to secure the same, was not, as a matter of fact, made with any fraudulent intent, nor for the purpose of delaying or hindering the creditors of Charles Elias."

*As to the Second Proposition.*—There is not perhaps in the whole range of the judicature of this country and of England a more vexed question than the one now under consideration. Mr. Jones, the distinguished author of the latest and confessedly the most valuable works on Mortgages of Real Estate and of Chattels, in a recent number of the *Southern Law Review*, Vol. 7, (N. S.) p. 95, has treated the subject of fraud in chattel mortgages in a most masterly manner. I can do little more with propriety in the narrow limits of a Circuit decree than to direct attention to that article, and state his conclusions with some of the reasons given. I can certainly hope to add little, if indeed anything, of value, to his vast array of authorities or to the force of his reasoning. If I be then sustained or overruled in the conclusions which I shall announce, which have been attained with some labor, there can be as little cause for exultation on the one hand as for depression on the other, for it appears that the main question involved, to wit: Whether a mortgagor's possession of mortgaged goods with power of disposal, makes the transaction fraudulent *per se*, or only *prima facie* evidence of fraud to be passed upon by a jury (or master or referee) upon all the evidence, and the surrounding circumstances of the case, has been passed upon by twenty-six courts of last resort in the Union—thirteen of them holding one way, and thirteen the other. To the many holding the doctrine that the transaction is fraudulent *per se*, upon a peculiar state of facts, and upon which some observations will be made hereafter, may be added the case of *Robinson v. Elliott*, 22 Wall. 513.

The definition of fraud is always matter of law. The statutes of Elizabeth, thirteenth and twenty-seventh, are declaratory of the common law, and it was said by Lord Mansfield that "the principles of the common law, as now universally known and understood, are so strong against fraud in every shape that the common law would have attained every end proposed by these

---

April Term, 1882.

---

statutes." These statutes do not embrace conditional sales, and we have in this State no statute enlarging the operation of the statutes of Elizabeth, as are to be found in some of the statutes of the Union, and upon whose judicial decisions has been engrafted what is styled "the American doctrine of *Twyne's Case*." And, in this connection, it may be profitable to bear in mind, that in the array of cases holding the doctrine contended for by the plaintiff here, statutory enactments will be found which make the retention of possession by the mortgagor fraudulent as in the case of absolute transfers.

But even in cases of absolute conveyance, the early doctrine announced by Marshall, C. J., in *Hamilton v. Russell*, 1 *Cranch* 310, although since much discussed, has not been shaken or altered, i. e., that possession consistent with the deed is not fraudulent, and possession inconsistent with the deed is fraudulent in law, and that it is this consistency, or inconsistency, which settles the question of fraud in law.

To a *dictum* of Judge Buller, in *Edward v. Harben*, 2 *T. R.* 587, it is said undue importance has been given in the English courts; but Chancellor Harper, in *Smith v. Henry*, 1 *Hill* 21, acknowledging that the case was supposed to have been overruled or departed from by subsequent decisions, upon the examination which he had been able to make of the several cases, thought it not impossible to reconcile them. Whether such result was successfully accomplished by that most learned judge, it is now certain, that in England, the case has been questioned, and the doctrine sought to be established by it has been overthrown in the case of *Martindale v. Booth*, 3 *Barn. & Ad.* 498, and others. In that case Parke, J., and Patterson, J., by different forms of expression, argue that "there is no sufficient authority for saying that the want of delivery of possession absolutely makes void a bill of sale of chattels." It was conceded to be a badge of fraud "which ought to be left to the jury; then if a badge of fraud only \* \* \* all the circumstances must be taken into consideration."

And I submit that it would be as illegal and as illogical to convict one charged with crime upon a single well-forged link of circumstantial evidence, when all the other links of the

## Circuit Decree.

chain were defective, as to adjudge and conclude a transaction to be fraudulent from the existence of a single badge of fraud, however well defined the same might be. In such case "all the circumstances must be taken into consideration."

The foregoing authority and observations apply in the main to absolute sales, not to conditional sales or mortgages, so much affected here by our registry laws, which have wholly changed the character of mortgages at common law, except in those rare cases where possession is transferred to the mortgagee. In England there has not existed until recently, if there is now, any general system of registration similar to ours. See *Life of Lord Campbell* (Am. ed.), Vol. 2, p. 89. Then great stress seems to have been laid on the earlier cases, in the time of Judge Buller, for instance, upon the fact of retention of possession by the mortgagor; such was held to be conclusive evidence of fraud not susceptible of explanation. But Mr. Jones, in the article above referred to, says: "The modern English doctrine, (citing numerous authorities in note 2, p. 97,) and that more generally adopted by the American courts, (see cases cited in note 3, p. 97,) is, that possession by a vendor as mortgagor, is only *prima facie* a badge of fraud; that the presumptions arising from that circumstance may be rebutted by explanations showing the transactions to have been fair and honest; and that the question of fraud is always one of fact for a jury to determine."

And so Mr. May, on *Fraudulent Conveyance*, p. 101, says: "It by no means follows, though, that because there is no possession given, a transfer is fraudulent, for those cases in which the judges have said that if possession was not given, it was fraudulent, must be taken with reference to the circumstances of each case. The question of possession is one of much importance, but that is with a view to ascertain the good or bad faith of the transaction." In *Arundell v. Phipps*, 10 Ves. 139, Lord Eldon said that the mere circumstance of the possession of chattels, however familiar it might be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing until a title not fraudulent is shown under which that possession has followed—that every case from *Twyne's Case* downward supports that, and there was no occasion otherwise for

---

April Term, 1882.

---

the statute of King James. There was no sufficient authority for saying that the want of delivery of possession makes void a bill of sale of goods and chattels; it is *prima facie* evidence of a fraudulent intention, and if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration.

I suggest with the greatest diffidence and at the risk of being charged with iconoclasm, some further observations upon the subject of fraud. There appears to me to be some confusion and much injustice of distinction in the meaning of the familiar terms, legal fraud or fraud in law, and actual fraud or fraud in fact. This enforced distinction has sometimes involved its advocates in the manifest absurdity of maintaining a transaction to be fraudulent in law which they are forced to admit is *bona fide* in fact. Surely the law, which is boastfully said to be the perfection of human reason, if properly understood and rightfully administered, can effect no such result.

*Actus legis nemini est damnosus.* Would it not be more consistent with the *perfection of human reason* and with the harmony of legal science, to say that the only real distinction is to be found in the means and manner in which fraud is made to appear? Illustration is sometimes more convincing than argument. Suppose A. should convey his entire estate (being indebted) to B. for very inadequate consideration, and should stipulate in the deed of conveyance for the return of the usufruct to himself. That transaction would be hastily adjudged, and properly, to be fraudulent, fraudulent *per se*. Suppose an adequate consideration were stated in the deed, but neither paid nor secured to be paid, and the matter of the usufruct were made the subject of a private bargain or arrangement, and B., put upon the stand, disclosed the whole truth about it—the latter too would be adjudged to be fraud, fraud in fact, and by the casuist would be regarded an act of greater moral turpitude on account of the baser means used to accomplish the same purpose as in the former case. But the same law adjudges both transactions, and pronounces precisely the same judgment on each, by declaring both to be utterly fraudulent, null and void.

These illustrations are of extreme cases, it is true, and inter-

## Circuit Decree.

mediately are to be found in the multitudinous transactions of men, the infinite diversity of fraudulent acts which so obscure our minds.

To one who marveled what should be the reason that acts and statutes are continually made at every parliament without intermission and without end, a wise man made a good and short answer, which is well composed in verse :

*Quesitur ut crescunt tot magna volumina legis ?*

*In promptu causa est, crescit in orbe dolus.*

Having already referred to the able article of Mr. Jones in the *So. Law Rev.*, *supra*, in which the authorities are collected, and to the same writer's work on *Chattel Mortgages*, it is but fair that I should refer to a collation of the authorities, which support the views contended for by the plaintiff here ; these are collected with great care by Mr. James O. Pierce in an article in the same *Review*, Vol. 2, p. 731 ; and also to *Herman on Chattel Mortgages*, *passim*. It is not consistent with the proper limits of this decree to do more than give these references, make the promised observations upon the case of *Robinson v. Elliott*, and review as briefly as I can the case of *Griswold v. Sheldon*, 4 N. Y. 581.

This case is selected for the reason that it stands at the head of the many cases containing the doctrine contended for by the plaintiffs here, and may justly be considered a Pandora's box out of which has come a multitude of evils and distempers, increasing the law's uncertainty. Judge Lowell, an eminent district judge of the United States Court for the district of Massachusetts, in the case of *Brett v. Carter*, reported in Vol. 3, No. 18, *Cent. L. Jour.*, p. 286, referring to this case in 4th *Coms.*, *supra*, says : "This doctrine has had a remarkable vitality, considering the feebleness of its birth, to have become the law of New York, Ohio, Illinois, and probably of some other States. It is not the law of England, Maine, Massachusetts, Michigan, Iowa, and probably of some other States."

Mr. Jones, the author of the valuable works already referred to, makes the enumeration more fully, as already stated. By reference to the case of *Griswold v. Sheldon*, *supra*, it will be seen that Judges Brown, Ruggles, Jewitt and McCoun, sustained

---

April Term, 1882.

---

the views of the plaintiffs here, opposed by Judges Mullet, Gardnier, Gray and Paige—an equally divided court. By *Sec. 5, 2d Rev. Stat.*, p. 136 (New York), it is provided that when the possession of the mortgage is not changed, the mortgage in law is presumed to be fraudulent. Similar statutory enactments are to be found in others of the thirteen States which have adopted the New York doctrine, extending the provision of the statutes of Elizabeth, and the doctrine of *Twyne's Case* to conditional sales.

In South Carolina there has been no statutory enlargement, and the current of decisions by our own courts is unbroken in holding that the possession by the mortgagor, after condition broken, is not regarded even as a badge of fraud. *Gist v. Pressley*, 2 Hill Ch. 323; *Maples v. Maples*, Rice Ch. 300; *Bank v. Gourdin*, Spear Eq. 439; *Fishburne v. Kunhart*, 2 Spear 556; *Smith v. Henry*, 1 Hill 16, and the class of cases attaching so much and such just importance to the fact of possession by the vendor, will be found upon examination to be cases of absolute sale and obnoxious to the statutes of Elizabeth, made of force here by statute, and re-enacted in the general statutes of the State, but without enlargement.

The plaintiffs here, however, are not content to claim the retention of the possession by Elias, the mortgagor, as merely a badge of fraud or a presumption of fraud, but urge such retention as a conclusion of law that it is fraud *per se*, and, as such, not susceptible of explanation. Such, it is true, is the nature of a conclusion, for it means, "determination, final decision," and, as such, I maintain that its basis should be irrefragable truth. It should be so potential, so comprehensive, and so complete as to exclude all reasonable possibility of the existence of a state of things different from that which it determines. Whenever, through its operation, the law destroys the right or privilege of a citizen, it becomes the oppressor of those whom it is its duty to protect, and is as merciless, as cruel, and as unjust as the bed of Proustes. To this doctrine I cannot yield assent. It is not in harmony with the principles of justice; it is not consistent with truth, which, for a time, at least, it may crush; and it may be well to consider, lest in intemperate zeal to prevent fraud, we



## Circuit Decree.

do err in that more reprehensible extreme of perpetrating a judicial wrong.

*Robinson v. Elliott*, 22 Wall. 513. If this decision of the Supreme Court of the United States were conclusively in favor of the doctrine contended for by the plaintiffs here, while from the manifest difference in the manner and purpose, and length of time of the retention of the mortgagor's possession, I hold it to be altogether otherwise; I am by no means prepared to admit that it would be my duty to surrender unconditionally my convictions to a decision made even by that august tribunal. I should feel constrained to do so if the contention were upon a matter of which that court might or would have in the orderly progress of the cause the right of final arbitrament, in a case, for instance, involving a constitutional question, wherein the right of appeal would be finally to that court. But in all other cases (and this one is such) it seems to me that the decisions of the court, whilst entitled to the profoundest respect, are to be followed by the State courts only on account of the cogency and value of their reasoning.

If Judge Lowell, of the District Court of Massachusetts, in the case of *Brett v. Carter*, already referred to, could venture "to doubt, both the generality and the justice of the doctrine," as laid down by Mr. Justice Davis in *Robinson v. Elliott*, of whose court that of the learned district judge is an appendant, it could hardly be regarded as an act of judicial rebellion in me to do likewise. I cannot say, however, that I am prepared to distrust the justness of that decision or its correctness in view of the peculiar facts of the case, nor is it necessary, in my opinion, to do so in order to sustain the validity of the mortgage under consideration here.

I claim, to the fullest possible extent, the right to adjudge, as matter of law, the existence of legal fraud wherever it appears upon the face of the instrument itself. The true question is as to the degrees of conclusiveness (so to speak). Was it a presumption of fraud to be explained or rebutted by proof on the part of the mortgagors, or was it a legal conclusion of fraud, not susceptible of explanation? The learned Justice held the latter view; and under the fierce light that beats upon every judicial

---

April Term, 1882.

---

trial, always so much brighter than the most luminous report that can be made of it, it would be as far from me as it would be unbecoming to say that the decision was not right. But the facts and circumstances of the case differ widely from those of the case at bar. The main inquiry in both, as in all such, is, for what purpose was the mortgage in fact given? Was it given as a security, pure and simple, or was it for this and something more, such as a personal benefit to the mortgagor, or an injury in the shape of obstruction or hindrance to other creditors?

Mr. Justice Davis found both of these obnoxious features on the face of the Cooledge mortgage. He says: "Manifestly it (the mortgage) was executed to enable the mortgagors to continue their business, and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom"—this was the unlawful benefit to the debtors. Again he says: "Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, *and appropriate the proceeds to their own purposes, and this, too, for an indefinite length of time.*" The Italics are mine. This is the other feature of hindrance to creditors.

Upon the face of the mortgage the covenants for further endorsements are renewals by Robinson for other amounts, and the renewal from time to time of the notes to Mrs. Sloane gave to the transaction the character of continuance, permanency; and it might well have been questioned if, in the face of these covenants, before a renewal occurred, or a further endorsement was made by the mortgagors, they would have been permitted to enforce their mortgage at all. The transaction stipulating for "further endorsements," and "renewals from time to time," extended over a space of twenty-five months; and the catastrophe finally occurred upon the death of one of the mortgagors and the discovery of the firm's insolvency. Neither the sum to be secured nor the time for enforcing the payment was fixed. Such uncertainty of amount, such indefiniteness of time could not be cured by the maxim, "*id certum est,*" etc., especially so when these qualities of certainty and fixedness are absolutely indis-

## Circuit Decree.

pensable in determining the question, whether or not the mortgage is a security pure and simple, or a security and something more, that *something more* being abhorred by the law.

In the case at bar it appears that early in December, 1878, Israel became uneasy upon the subject of Elias' indebtedness to him, and went to Columbia to see about it. He held Elias' notes then for \$1,500, soon to become due. Elias wanted more money. Israel agreed to let him have \$500 more if he would secure him with a mortgage covering that sum and also the \$1,500. Was it more or less than the old, old story of sending good money after bad—sometimes wise, sometimes otherwise, always lawful, not always expedient? Elias was a merchant, and the mortgage given was for merchandise estimated at the time as more than double in value the amount of the mortgage debt. It was duly recorded within the time prescribed by the statute, and the plaintiffs were then bound with notice of its contents. On January 10th, more than two weeks after Israel's mortgage was recorded, the plaintiffs took from Elias the note secured by mortgage of the same stock of goods with which they have come into court. Their mortgage differs from Israel's only in the amount of debt secured, in date, and in the absence of a provision to subject accretions of merchandise to its lien. It was taken on January 10th, held without recording to January 24th, and, so far as appears from the pleadings and proof, no steps were taken for its enforcement until after the seizure of the goods under Israel's mortgage on February 10th. It was four days after this, to wit, on February 14th, that plaintiffs' action was begun.

Thus it appears as matter of fact that Elias' retention of possession ended four days before the plaintiffs' suit was begun, and it might be interesting to inquire how far this reduction into possession by Israel of the mortgaged goods, would go to cure the vices of his mortgage, if it had any. Authorities to sustain this position may be abundantly found in the decisions of other States, and in the further stages of this case such inquiry may not be unprofitably pursued.

Without referring again to the various allegations of fraud in fact, so-called, these having been disposed of by concurrence

---

April Term, 1882.

---

in the master's findings, it only remains to consider that which is claimed to be the especially vulnerable part of Israel's mortgage, and this the plaintiffs allege is to be found in the effort on Israel's part to subject the accretions of merchandise acquired by Elias in the course of trade to the lien of the mortgage; and, on this account, it is urged that the mortgage is fraudulent upon its face. This is the only feature (save in date and amount) in which Israel's mortgage differs in form from that of the plaintiffs, and both, it appears, allowed Elias to retain possession of the goods after condition broken. I am not able to see anything more in this than what may or may not have been a vain effort on the part of Israel to increase his security and so provide against loss. The pleadings and proof in the case have not presented this matter in such manner as to make it a living issue in the case. If Elias' retention of the goods had been of such duration as to have enabled him to dispose of the stock actually mortgaged, and the accretions amounted to a substitution of another stock in its stead, and the proof had made this apparent, this vexed question would have required an answer; but I cannot attach to this provision of the mortgage the character and importance of a shibboleth, and condemn Israel to the loss of his debt either for pronouncing it or for not pronouncing it.

How far such accretions would be affected by the principle decided in the case of *Moore v. Byrum*, 10 S. C. 452, or the late case of *Parker & Co. v. Jacobs*, 14 S. C. 112, it is scarcely necessary to inquire; for, as I understand the case, the question of the lien of the mortgages upon accretions to the stock (there being no proof of such) does not arise here, the attempt to bind the accretions by Israel's mortgage having been urged only as evidence of fraud upon the face of the mortgage itself; and for this, in my judgment, it is not sufficient.

Therefore it is adjudged and decreed that the master's report herein, dismissing the plaintiffs' complaint, be and the same is hereby affirmed, that the defendant have judgment against the plaintiffs for their costs, and that the defendant Israel have leave to move the court for such orders, touching the funds in the sheriff's hands, arising from the sale of the mortgaged goods

---

Opinion of the Court.

---

as he may be advised are necessary to accomplish the proper distribution of the same.

The points made by the exceptions are sufficiently stated in the opinion of this court.

*Mr. J. P. Carroll*, for appellant.

*Messrs. Melton, Clark & Muller*, contra.

October 31st, 1882. The opinion of the court was delivered by MR. JUSTICE McIVER. The main object of this action is to set aside, on the ground of fraud, a mortgage on a stock of goods, wares and merchandise, given by the defendant, Charles Elias, to his co-defendant, Morris Israel.

It is conceded that there are only two questions presented by this appeal, one of fact and the other of law. The first is whether the evidence was sufficient to show that the mortgage in question was executed with intent to hinder, delay and defeat the other creditors of the mortgagor; and secondly, whether the mortgage is not, as matter of law, fraudulent and void because it covers not only the stock of goods on hand at the date of the mortgage, but also "such goods, wares and merchandise as may from time to time hereafter be acquired in lieu and place thereof in the current business of the said mercantile establishment;" thereby plainly evincing an intention that the mortgagor should continue business by selling the goods in the usual course of trade, and replenishing the stock from time to time as occasion might require.

The first question is one of fact and it has been determined adversely to the appellants by the master, to whom all the issues in the action were referred, and his conclusion has been concurred in by the Circuit judge. Under these circumstances this court, according to the well settled rule, will not interfere unless the conclusion below is without any testimony to sustain it, or is manifestly against the weight of the evidence. It certainly cannot be said that there is no testimony to sustain the conclu-

---

April Term, 1882.

---

sion reached by the master and concurred in by the Circuit judge; and we think it quite clear that such conclusion is not manifestly against the weight of the evidence. On the contrary, it seems to us that there was but little, if any, evidence of any fraudulent intent on the part of the defendant Israel. If his testimony is to be credited, (and it is not impeached; but, on the contrary, is corroborated in a very material part by the testimony of Mr. Melton,) the transaction, so far, at least, as Israel was concerned, was a *bona fide* effort to secure a debt justly due him, and we are unable to discover any sufficient reason for imputing any fraudulent intent to him. We do not, however, propose to enter into a discussion of the testimony, as it is sufficient for us to say that the argument here, together with a careful examination of the testimony, has failed to show any error in the conclusion reached by the master and affirmed by the Circuit judge.

The next question, though much discussed elsewhere, with varying results, has never been determined in this State, so far as we are informed. We do not deem it necessary to go over the discussion, for the very full, satisfactory and conclusive argument of the Circuit judge leaves us nothing to add, and we are quite content to rest our conclusion upon the reasoning employed and the authorities adduced by the Circuit judge in his able and exhaustive decree.

It is alleged, however, that the Circuit judge has fallen into two errors of fact: one in stating that the mortgage to the plaintiffs allowed the mortgagor to retain possession of the mortgaged goods after condition broken; the other in stating that the mortgagor made no additions to his stock of goods after the execution of the mortgage to Israel; and these, perhaps, should be noticed.

Even conceding these allegations to be well founded, we are unable to perceive how this could affect the conclusion reached by the Circuit judge. His argument to show that the mortgage in question was not to be adjudged fraudulent, simply because it contained a provision authorizing the mortgagor to continue business, selling and replenishing his stock in the usual course of trade, does not rest upon either of these statements, which were

## Opinion of the Court.

simply thrown in—one, perhaps, for the purpose of showing that the mortgage of plaintiffs was subject to the same objection as they were urging against the mortgage to Israel, and the other for the purpose of showing that the position which seemed to have been practically abandoned before the master, that the mortgage of Israel must be postponed to the mortgage of plaintiffs, so far as the goods acquired subsequent to the execution of Israel's mortgage were concerned, did not have the requisite basis of fact to rest upon. This, however, was an independent question, and one which could in no way affect the main question, as to whether a mortgage containing a provision like the one in controversy would thereby be rendered fraudulent *per se*.

We agree with the Circuit judge that the pleadings and evidence did not present this matter in such a way as to make it "a living issue in this case." In order to present the question fairly whether the lien of the mortgage to Israel should be postponed to that of the plaintiffs, so far as any additions to the stock of goods were concerned, it would not be sufficient to show that such additions were made after the date of the mortgage to Israel, but it would be necessary to go further, and show that such additional stock was in the store at the time of the execution of the mortgage to the plaintiffs, for their mortgage does not purport to cover any goods except such as were in the store at the time their mortgage was executed. Upon this point the testimony is silent. There was evidence that additions to the stock had been made after the execution of the mortgage to Israel, but when such additions were made, whether before or after the mortgage to the plaintiffs, does not appear; nor does it appear what portion, if any, of such additional stock was in the store at the date of the mortgage to the plaintiffs.

But waiving all this, it seems to us that under the doctrine established by the case of *Parker v. Jacobs*, 14 S. C. 112, the lien of Israel's mortgage covered as well the subsequently acquired goods as those in the store at the time it was executed. His mortgage was not given to secure future advances, but an existing debt, and the lien took effect so soon as the goods were acquired by the mortgagor, and is not postponed to the lien of the junior mortgage, as might be the case if the advances were

---

April Term, 1882.

---

made and the debt arose subsequently to the execution of the second mortgage, under the principles announced in *Walker v. Arthur*, 9 *Rich. Eq.* 401.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

STATE v. PUTMAN.

1. An indictment against A., B. and C, for murder, charged A. with shooting the deceased, and B. and C. with being present, aiding and abetting, and the jury found all three guilty of manslaughter. *Held*, that B. and C. were charged as principals and not as accessories before the fact, and that there was no ground for arresting the judgment.
2. Persons may be present, aiding and abetting in the commission of manslaughter, and so be guilty themselves of this crime.

---

Before ALDRICH, J., Anderson, March, 1882.

The indictment, verdict, sentence, and notice and grounds of appeal, constitute the brief in this case. They are sufficiently stated in the opinion.

*Mr. W. C. Benet*, for appellant, cited 1 *Arch. Cr. P. & P.* 806, 61, 62, 65; *Whart. Hom.* 35, 157; 2 *Bail.* 75; 1 *Hale P. C.* 437-9; 40 *Eng. L. & Eq. Rep.* 357; 3 *Gilman* 381; 47 *Ill.* 323; 10 *Ohio St.* 460; 2 *Bish. Cr. Proc.* §§ 3, 4; 33 *Gratt.* 834; 2 *Green Crim. Rep.* 289.

*Mr. Solicitor Orr*, contra, cited 2 *Brev.* 338; 4 *Strob.* 138, and note; 2 *Bail.* 31, 69; 4 *Rich.* 362; *Hawk. P. C.*, ch. 25, § 64; 1 *East P. C.* 351.

October 21st, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. This was an indictment for murder, in which Isaac Putman was charged with shooting Giles Guess, and the other defendants, Lilly Putman and Silas Put-



---

Opinion of the Court.

---

man, were present aiding and abetting therein. The indictment then concludes, "and the jurors aforesaid, upon their oaths aforesaid, do say, that the said Isaac Putman, the said Silas Putman and the said Lilly Putman, him, the said Giles Guess, in manner and form, and by the means aforesaid, feloniously, willfully and of their malice aforethought, did kill and murder," &c. The jury found a verdict "guilty of manslaughter, Silas Putman and Lilly Putman recommended to the mercy of the court."

The defendants, Silas Putman and Lilly Putman, moved in arrest of judgment and to set aside the verdict as to them, and failing, then for a new trial upon the following ground: "Because the jury having found a verdict of manslaughter as to Isaac Putman, who did the shooting, sudden heat and passion, the elements of manslaughter, could not be attributed to Lilly and Silas. Therefore the jury erred in finding them guilty in the same degree as Isaac." The judge refused all the motions, and Silas and Lilly appealed to this court upon the ground that his Honor erred in not arresting the judgment.

This was an indictment for murder against three persons, alleging that one of them did the act, and that the other two were present aiding and abetting therein. It did not charge one as principal and the others as accessories before the fact, but all as principals; as it is sometimes expressed, one in the *first* and the others in the *second degree*. There can be no doubt that with reference to the crime of murder the indictment was correctly framed and in exact accordance with established forms. *State v. Rabon*, 4 *Rich.* 264.

In that case three persons were indicted for murder. The indictment alleged that the fatal wound was given by Abram Rabon, the younger, and that Abram Rabon, the elder, and Duke Rabon were present aiding and abetting in the felony. All the defendants were found guilty, and in delivering the judgment of the appeal court, Judge Evans said: "The defendants might have been charged as principals in the first degree. In *Arch. C. P.* 396, it is said that the pleader may charge the principal in the second degree as a principal in the first degree (for proof that he was present aiding and abetting will, in such case, maintain an indictment charging him with having actually committed the

---

April Term, 1882.

---

offense), or, at his option, as being present aiding and abetting. The better mode, however, is to describe the part which each had in the crime, according to the proof of the facts as is the universal practice, and as has been done in this case. When this mode of pleading is adopted the indictment consists of three parts: 1. That Abram Rabon, the younger, feloniously, willfully and of his malice aforethought, gave the mortal wound. 2. That the other persons were feloniously present aiding and abetting and assisting in the commission of the murder; and 3. The conclusion which the law draws from the parts stated, that all of them are guilty of the murder." The indictment in this case was drawn in accordance with the form here recommended, and if the defendants had all been found guilty of murder, there could have been no question about the sufficiency of the indictment to support the finding.

But conceding that the indictment is according to the most approved form in reference to the crime of murder charged, it is suggested that, the jury having found that no murder was committed—only manslaughter—the condition of things is entirely changed, and the indictment must be read as if it charged only the crime of manslaughter, and that with reference to that crime, which is in its nature sudden and unpremeditated, there cannot be a principal in the second degree, and therefore the allegation in the indictment as to the parties aiding and abetting, should be ignored or stricken out as inappropriate, and the judgment arrested as to Silas and Lilly. This is plausible, but it seems to rest on the view that the charge of being present, aiding and abetting, is equivalent to that of being accessory *before the fact*.

It is conceded that there can be no accessories before the fact *in manslaughter*, but the authorities do not sustain the view that being present, aiding and abetting, is identical with an accessory before the fact, which consists in counseling, advising or procuring the act to be done, and may be a great while before. The charge of being present, aiding and abetting, is but one of the forms of charging the parties as principals. "The distinction of principal in the first and second degree was a mere distinction in fact, and is no longer recognized." *State v. Fley and Rochelle*,

---

Opinion of the Court.

---

2 Brev. 338 ; *State v. Posey*, 4 Strob. 138, and in a note, *State v. Green*. In the case of *Fley and Rochelle*, Judge Brevard said : "All persons present, aiding and abetting a murder, are regarded as principals, and equally guilty. The actual perpetrator is regarded as the agent or instrument by which the crime is perpetrated, not as the chief criminal or more guilty than his associates. It sometimes happens that he is comparatively less guilty than those who stimulate or persuade him to be their instrument. The distinction between principals in the first and second degree has been long since exploded ; it is now considered a distinction without a difference."

Upon an indictment for murder the jury may find a verdict for *manslaughter*. Indeed, this is so well established that an indictment for manslaughter, as such, is rarely, if ever, given out. This being the universal practice, it would seem strange, if the view suggested is sound, that the question made here has never arisen before. The court has not been referred to any case upon the point, and in the short search which the press of business has enabled us to make we have not been able to find one. If a verdict for manslaughter can be rendered upon an indictment for murder against the perpetrator of the deed, why may not the same verdict be rendered against those who are charged as principals in aiding and abetting the crime. This must be allowable, unless the character of the crime of manslaughter is such as necessarily to exclude the possibility of participation or co-operation on the part of others present at the act.

It is true that the characteristic element of the crime of manslaughter is that, although a homicide, it is committed in sudden heat and passion and without malice aforethought. It is defined to be "the unlawful killing of a human being upon sudden heat and passion arising from reasonable provocation." But, as we understand it, this does not necessarily limit the offense to the persons who actually did the deed when several were present and engaged in a common quarrel. The provocation given may extend to others as well as to the principal actor. Although the crime is said to be "sudden and unpremeditated," it need not be on the instant the provocation is received. In its regard for the weakness of human nature the law allows a certain time—rea-

---

April Term, 1882.

---

sonable time—for the transport of passion to continue before “cooling,” and during that time it does not seem to us impossible for others present, affected by the same provocation and passion, to stimulate and incite the principal actor to the perpetration of the deed.

The particular facts of this case are not before us. None of the circumstances of the killing are in the brief. All we know is from the allegations of the indictment that Isaac was charged with doing the act, that Lilly and Silas aided and abetted therein, and that all were found guilty of manslaughter. The jury found that *Silas and Lilly co-operated with Isaac* in committing the homicide, and we cannot say that such finding was so impossible or unauthorized as to justify us in arresting the judgment as to them.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

CARTER v. DUPRE.

1. A contract for rent of a farm carries with it, under the statute (16 Stat. 411), a lien on the tenant's crop for the payment of the rent, without an express agreement that there shall be a lien.
2. A wife, holding a preferred lien for rent on the crops made by her husband on lands leased by him from her, is not estopped from asserting her lien, as against a second lien for supplies, by reason of her signing a first lien for supplies (inferior to her rent lien) given by her husband, or because of payments made by him on such first lien for supplies, and to other persons.
3. Cotton delivered by this tenant to the landlord for rent having been seized under legal process at the instance of the holders of the latest lien, the landlord is entitled to recover from the sheriff the highest value of the cotton at any time between the seizure and trial, with interest from the date of seizure.

---

Before KERSHAW, J., Abbeville, February, 1881.

Action by Amanda B. Carter against J. F. C. DuPre, commenced December 29th, 1879. The opinion fully states the case,

---

Opinion of the Court.

---

but it may properly be added that the cotton made on the leased premises, according to the testimony, was eight bales, exclusive of the seed cotton seized by the sheriff; and that the brief does not show that the presiding judge was ever requested to charge the propositions stated in the second, third, fourth and fifth exceptions.

*Messrs. Burt & Graydon*, for appellant.

*Messrs. Noble & Noble*, contra.

October 21st, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. This action was brought by Amanda B. Carter against the defendant, sheriff of Abbeville county, for seizing 2,320 pounds of cotton in the seed, claimed to be her property. It seems that the plaintiff is the wife of Samuel E. Carter and the mother of Charles P. Carter, who lived in the house with his parents; that she claimed title to the land on which the cotton was made, and that she had rented it verbally to her husband, Samuel E. Carter, for the year 1879, for two bales of cotton.

On February 9th, 1879, Samuel E. Carter and his wife, the plaintiff, executed to John Knox an agricultural lien for guanos, provisions and other supplies to the amount of \$150, and at the foot of the paper Mrs. Carter stipulated as follows: "I hereby agree that John Knox shall collect the above lien before I demand my rent." On March 6th, 1879, Samuel E. Carter and Charles P. Carter executed to George W. Williams & Co. an agricultural lien for \$123.50, to be paid in cotton made on the place, for fertilizers. Under this junior lien George W. Williams & Co. issued an agricultural warrant, and had the cotton in question seized by the sheriff, and the plaintiff, alleging that the cotton had been delivered to her in payment of her lien for rent as landlord, brought this action for the cotton.

The real defendants are George W. Williams & Co., though the sheriff answered and put in a general denial. They denied that the plaintiff had rented the lands to her husband, or that she had any title to the cotton; but if so, they insisted that she was estopped from claiming it, for the reason that she had allowed

---

April Term, 1882.

---

Knox to be paid first out of the cotton made on the place, and having done so it was inequitable in her to claim the little balance for her rent to the exclusion of their lien. The case came on to be heard before Judge Kershaw, who charged the jury: "That there must be a contract of renting, either written or verbal, between the landlord and tenant, before the landlord can have a lien for rent; that the plaintiff was not estopped from claiming the cotton in suit as rent by signing the lien to John Knox; that if Samuel E. Carter had delivered the cotton in suit to the plaintiff in payment of rent due, the jury must find a verdict for her, and that if so, the measure of damages was the highest value of the cotton sold at any time between the seizure and the trial, with interest from the date of seizure."

The jury found, for the plaintiff, the sum of \$102.05, and the defendants appeal to this court upon the following grounds:

1. "Because the presiding judge erred in refusing to charge that there must be a contract, either written or verbal, between the landlord and tenant, for a lien upon the crop of the tenant, before the landlord can have a lien for rent such as will displace the rights of other lien creditors.

2. "Because the presiding judge erred in refusing to charge that the plaintiff was estopped from claiming the cotton in suit as rent by signing the lien of her husband, her alleged tenant, to John Knox for supplies.

3. "Because the judge erred in refusing to charge that the plaintiff was estopped from claiming the cotton in suit as rent by paying out of the crop the account of her husband and son with said John Knox, although in said accounts there were charges for whiskey and tobacco and other articles not agricultural supplies, and although her son had even given said John Knox a lien for supplies.

4. "Because the judge erred in refusing to charge that the plaintiff was estopped, or might be estopped, from claiming the cotton in suit as rent by allowing her husband and her son to sell cotton on the place, receive the money and use it, if they found as matter of fact that she allowed them to do so.

5. "Because the judge erred in refusing to charge that the plaintiff was estopped from claiming the cotton in suit as rent

---

Opinion of the Court.

---

by paying out of the crop the account of her husband and son with the said John Knox, contracted after the crop had been made and 'laid by,' and some of it after the crop had been gathered.

6. "Because the judge erred in charging the jury that if Samuel E. Carter had delivered to the plaintiff the cotton in suit, they must find a verdict for her, although, according to her own testimony, half the cotton was in the field at the time the levy was made, and although the defendant had made a levy under a valid lien, which was not disputed.

7. "Because the judge erred in charging that the measure of damages was the highest value of the cotton sold at any time between the seizure and the trial, although the defendant had in good faith paid for the picking and ginning, and expended money in good faith for the bagging and ties which went to make up the proceeds of sale, and although the plaintiff consented to the ginning and selling."

Much evidence upon questions of fact is printed in the brief, but this being a law case tried by a jury, this court has no right to consider the proper force and effect of that evidence. We are limited to the inquiry whether there was error of law in the charge of the judge.

As to the first exception there seems to be some misapprehension. The judge did charge "that there must be a contract of renting, either written or verbal, between the landlord and tenant before the landlord can have a lien for rent." But if it is meant that the judge should have charged that there must be an express contract also for a lien to secure it, we agree with the judge that no such contract was necessary. As between landlord and tenant the contract for rent once established, *proprio vigore*, gives the lien by force of the statute, which declares, "that each landlord leasing lands for agricultural purposes, shall have a prior and preferred lien for rent to the extent of one-third of all crops raised on his lands and enforceable in the same manner as liens for advances, which said lien shall be valid without recording or filing. 16 Stat. 411; *Kennedy v. Reams*, 15 S. C. 550.

Exceptions 2, 3, 4 and 5, upon the subject of estoppel, will be considered together. It is claimed that as against George W.

---

April Term, 1882.

---

Williams & Co., the plaintiff should be estopped from claiming this cotton as her rent, for the reason that she allowed Knox to be first paid, and in other ways allowed the crops subject to the liens to be disposed of and reduced to the remnant in controversy, which is not enough for both. We cannot say that the judge erred in refusing so to charge. This is not a case for the application of the principle of estoppel. As we understand it, the doctrine of estoppel by conduct "is where one party has been induced by the conduct of the other to do or forbear doing something which he would not or would have done but for such conduct of the other party. The conduct which is claimed to operate as an estoppel must have induced action the disavowal of which would be inequitable." *Bull v. Rowe*, 13 S. C. 370.

Let us apply this rule. What action of George W. Williams & Co. was induced by the conduct of Mrs. Carter in waiving her claim for rent so far as Knox was concerned? She did not sign the lien of the defendants, and had no relation to them which placed her under obligations to husband the crop for their benefit. She had a lien for rent, which she had a right to waive in favor of Knox, and not in favor of George W. Williams & Co. Besides, as the lien of the defendants was junior to the other liens, and, as we suppose, was last registered, it may be that they had notice of the agreement of Mrs. Carter to give way to Knox; but, however that may be, both the liens of the plaintiff and Knox were superior to that of the defendants, and we cannot see that they were induced to take any step by the conduct of the plaintiff, which is complained of.

The jury were instructed that if the cotton had been delivered by Samuel E. Carter to the plaintiff in payment of rent due her, then she was entitled to recover; but he left it to the jury to say whether the cotton had been so delivered. In the view that it had been so delivered to her, it was a trespass to take it even under legal process, and she was not only entitled to recover, but to recover such damages as were recoverable in an action of trespass or trover. "In trover, the jury is not limited to find the mere value of the property at the time of conversion, but may find, as damages, the value at a subsequent time at their discretion." 3 *Steph. N. P.* 2711. The jury may give the



---

Statement of the Case.

---

highest value up to the time of trial. *Kid v. Mitchell*, 1 *N. & McC.* 334. In *Burney v. Pledger*, 3 *Rich.* 191, Judge O'Neill says: "That the plaintiff is entitled to recover for the value of the property, at the time of the trial, with interest, or for the value of the property at the time of the trial, with hire from the conversion, as may be most beneficial." And in *Rogers v. Randall*, 2 *Spears* 38, it was held that the jury have a discretion between the highest and lowest estimates. *Harley v. Platts*, 6 *Rich.* 318.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

HOWARD v. HENDERSON.

1. Under a deed executed in 1873, whereby A. conveyed his homestead to B., in trust for A. for life, with remainder to C. (a married woman) for life, with contingent remainders over, the legal estate was vested in A. during his lifetime, by operation of the statute of uses.
2. It is only where the estate is intended for the sole use and benefit of a married woman, free from the debts and control of her husband, that the statute does not execute the use by reason of there being a trust declared for a married woman; but there can be no such intention in this deed as it was executed subsequent to the constitution of 1868, which secures a married woman's property to her own exclusive use.
3. The legal title remains in the trustee, in order to protect contingent remainders, only where the deed shows that such was the purpose of interposing a trustee.
4. Where, in the same instrument, estates are conveyed to a trustee in trust for different parties, the statute may execute the use in one case and not in the other.

---

Before HUDSON, J., Aiken, March, 1882.

This was an action by William S. Howard, Sr., against J. R. Henderson and J. F. Henderson, commenced in September, 1881, to recover the rents of the tract of land described in the deed, which is stated in the opinion of this court. J. R. Henderson died pending action, and his administrator answered,

---

April Term, 1882.

---

raising no issue of title. J. F. Henderson claimed to be the lessee of W. S. Howard, Jr., and, therefore, that he owed no rent to the plaintiff. The main issue in the case was whether the legal title was in W. S. Howard, Sr., or in W. S. Howard, Jr. Upon that point, his Honor charged the jury as follows:

The plaintiff contends that it is a deed of such purport as to confer upon the *cestui que use*, W. S. Howard, Sr., a legal estate for life, and not an equitable estate, *i. e.*, that the use is executed by the statute in such case made and provided. The defendant, Henderson, on the contrary, insists that the legal estate vested thereby in the trustee, W. S. Howard, Jr., still abides in him, and for the purposes of the trusts or uses must continue to so abide in him. Therefore he insists that W. S. Howard, Jr., rightfully leased the premises to him for the year 1881, and that to him as his landlord he is alone responsible for rents.

I concur in the construction of the deed contended for by the defendant, J. F. Henderson. The consideration of the deed is chiefly the love and affection of the grantor for the wife and children of his son, W. S. Howard, Jr., and their welfare is the leading object of the deed. The courts have generally held that the statute does not execute a use for the benefit of a married woman, nor in a case where the preservation of contingent remainders is necessary, nor where future duties are devolved upon the trustees. Nearly all these features appear upon the face of this deed, and to execute the use so as to confer a legal estate on W. S. Howard, Sr., for life would evidently be dangerous to, if not destructive of, the estates in remainder, the leading one of which is for a married woman for life.

I hold, therefore, that the legal estate in this land is, under this deed, in the trustee, and in the beneficiaries only an equitable estate, until in the contingent remaindermen the entire estate in fee with the rights of possession shall fully vest.

It is the duty, however, of the trustee to suffer the life-tenant to occupy, use and enjoy the premises during his life, so long as the same can be done consistently with the welfare of the life-tenant, and the preservation of the property for the remaindermen, and this use and enjoyment would be secured to the life-tenant by a court of equity, if necessary. Furthermore,

## Opinion of the Court.

should the life-tenant remove from the premises or abandon the same, and the trustee, from these or any other good causes, sees fit to lease the premises, he would be bound to account to the life-tenant for full, fair and reasonable rents and profits; and to enforce such accounting, the court of equity is always open to the *cestui que use*. In the event, however, that the trustee should, for good cause appearing to him, lease the premises to any one whilst the same are not occupied by the *cestui que use*, then the *cestui que use* can bring no action at law against such a tenant of the trustee for rent nor for use and occupation, because there is no contract betwixt them, either express or implied. The trustee alone has the right of action upon the lease, and the remedy of the *cestui que trust* is against the trustee, and in an equitable action. To such an action, he might, if needs be, make the tenant a party.

The exceptions, so far as they relate to matters considered by this court, raise, in several forms, the one question: Whether the legal title under this deed was in W. S. Howard, Sr., or in W. S. Howard, Jr.

*Messrs. Croft & Dunlap, P. A. Emanuel, for appellant.*

*Messrs. Henderson Bros., contra, cited 1 Ves. 485; 2 S. C. 133; 4 McC. 456; 1 Hill 414; 10 S. C. 386; 16 Id. 545; 3 Id. 100; 1 Spears 366, 591; 7 Rich. 81.*

October 25th, 1882. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. This action was brought by the plaintiff, appellant, to recover the rent for the year 1881 of a certain tract of land in Aiken county, of which the appellant claimed to be the legal owner. The defendants, respondents, denied the title of the appellant, and alleged that W. S. Howard, Jr., as trustee of appellant, was the legal owner of the land, and that the rent was due to him instead of to the appellant. Although several other questions were raised in the progress of the case, yet the question of title was the main question, and the solution of this question depended upon the con-

---

April Term, 1882.

---

struction of a deed, introduced in evidence by the defendants, of which the following is a copy :

"This indenture, made the 28th day of October, in the year of our Lord eighteen hundred and seventy-three, between William S. Howard, Sr., of the county of Aiken, and State of South Carolina, of the first part, and William S. Howard, Jr., of the county and State aforesaid, as trustee, as hereinafter set forth, of the second part, witnesseth, that the said party of the first part, for and in consideration of the love and affection he has for Mrs. Georgia V. Howard, wife of the said Wm. S. Howard, Jr., and her children, as well as in consideration of the sum of ten dollars to him in hand well and truly paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released, conveyed and confirmed, and by these presents does grant, bargain, sell, release, convey and confirm unto the said party of the second part, his successors and assigns, all that lot of land lying in said Aiken county, bounded \* \* \* containing two hundred and fifty acres, more or less, and being the homestead or residence of W. S. Howard, Sr., in trust, nevertheless, for the use, benefit and behoof of the said William S. Howard, Sr., during the term of his natural life, with remainder at his death to the said Georgia V. Howard, during the term of her natural life, and upon her death to such child or children of the said William S. Howard, Jr., and the said Georgia V. Howard, as may be living. Together with all and singular, the rights, easements, ways, members and appurtenances to the said lot of land being, belonging, or in any wise appertaining, and the remainders, reversions, rents, issues and profits thereof, and every part thereof. To have and to hold the said lot of land, and all and singular the premises and appurtenances thereunto belonging as aforesaid, and every part thereof unto the party of the second part, his successor in trust, and assigns forever, for the uses and upon the trusts hereinbefore mentioned," concluding with the usual warranty.

The defendants relied upon this deed as conveying the legal title to the land in question to the trustee, W. S. Howard, Jr.,

---

Opinion of the Court.

---

and, inasmuch as the defendant, J. F. Henderson, had rented the said land for the year 1881 from W. S. Howard, Jr., as trustee, by written lease, which was introduced in evidence, they claimed that the action of the plaintiff could not be sustained. On the other hand, the plaintiff also relied upon this deed, contending that the use provided for in the deed had been executed by the statute, and a legal estate for life had thereby been conferred upon W. S. Howard, Sr., the plaintiff, and that he was, therefore, entitled to his action. The presiding judge concurred in the construction contended for by the defendants, and charged the jury to that effect. Under this charge the jury found for the defendants.

The leading question in the case, as has already been stated, arises upon the construction of the deed of appellant, W. S. Howard, Sr., to his son, W. S. Howard, Jr., above referred to. We think, upon the authority of the cases hereinafter cited, that the judge was in error in his construction of this deed. In our opinion, the statute 27 Henry VIII., executed the use and transmitted a legal estate for life to the appellant, W. S. Howard, Sr., in the land in question. *McNish v. Guerard*, 4 *Strob. Eq.* 66; *Ramsay v. Marsh*, 2 *McC.* 252; *Bouknight v. Epting*, 11 *S. C.* 76.

In *McNish v. Guerard*, *supra*, the conveyance was to John McNish "to have and to hold in trust for the aforesaid children [naming them], and such other children as may be born of the body of Ann McNish, and to be divided among them equally, \* \* \* and until such division, to be occupied and used entirely and especially for the maintenance and support of the aforesaid children." The court, after a careful review of the authorities and the principles applicable to such cases (Chancellor Johnston delivering the opinion), determined that the legal estate in the land, by virtue of the statute of uses, vested, not in John McNish, the trustee, but in the existing children named in the deed, subject to open and admit such other children as Mrs. McNish might have.

In the case of *Ramsay v. Marsh*, *supra*, Col. Laurens by his will devised to Dr. Ramsay and wife all his lands at Long Cane, &c., to hold the same to them and their heirs in trust to and for

---

April Term, 1882.

---

the use and behalf of his granddaughter, Francis E. Laurens, during her life, and in case she should have a child or children, or grandchild or children, living at her death, then he devised the same to such child and to their heirs forever. The court held that the legal estate vested by the statute of uses in the *cestui que use*.

In the case of *Bouknight v. Epting, supra*, the terms of the deed were, \* \* \* "In consideration of the sum of \$800 to me paid by John Chapman, \* \* \* have granted, bargained, sold and released unto the said John Chapman, for his daughter Elizabeth, wife of George Epting, a certain tract of land, containing, &c., to have and to hold all and singular the premises before mentioned unto the said Elizabeth Epting, wife of George Epting, daughter of the above named John Chapman, her heirs and assigns forever." The court held (Mr. Justice McIver delivering the opinion), that the statute executed the use and that the legal title passed to Mrs. Epting.

The general rule is, as extracted from these and numerous other cases cited and discussed therein, in the language of Mr. Justice McIver: "That where land is conveyed to one for the use of another, or in trust for the use of another, and the person to whom the conveyance is made (the trustee), has no duties to perform, or where there is nothing for him to do requiring that the legal estate shall remain in him in order to enable him to do what is required, there the statute executes the use and the legal estate passes to the person for whose use the grant or conveyance was made." *Bouknight v. Epting, supra* 75. Or, as was said in *Jenney v. Laurens*, 1 *Spears* 356, "a use will be executed unless the purpose of creating it would be defeated by the execution, as in cases of trusts for married women, or to preserve contingent remainders, or where the trustee has some discretion to be exercised in relation to the estate or the manner of applying the proceeds."

The usual test applied is the latter branch of the above rule, to wit, whether the trustee has been invested with discretion to be exercised in relation to the estate, or the manner of applying the proceeds. If he is directed to receive and pay over rents and proceeds to the *cestui que trust*, then the legal estate remains

## Opinion of the Court.

with him so as to enable him to perform this duty. If, however, under the deed, the *cestui que trust* can act for himself in this matter, there being no necessity for a trustee, the use is at once executed, such being presumed to be the intention of the parties.

Now if the deed before the court is tested by this portion of the rule, there can be no reasonable doubt as to its construction. No direction whatever is given to the trustee as to the rents and profits of the land. He is not required either expressly or impliedly to collect and pay them over. He is not charged with any duty whatever in reference thereto. In fact, the implication derived from the circumstance that the land conveyed was the homestead and residence of the grantor, W. S. Howard, Sr., is that he was still to remain in possession during his life, enjoying the rents and profits as formerly.

The Circuit judge, however, bases his ruling upon the idea that the trusts created were in part at least for a married woman, Mrs. Georgia V. Howard, and also that contingent remainders were created for such of her children as might survive her, for the preservation of which a trustee, invested with the legal title, was necessary. In order to prevent the statute from executing the use in such cases, it must appear, first, as to a married woman, that the estate conveyed was a separate estate intended for her sole use and benefit, free from the debts and all control of her husband, and, secondly, as to preservation of contingent remainders, the terms of the deed must show that such was the purpose of interposing a trustee.

In the case of *Bouknight v. Epting, supra*, the deed was for the benefit of a married woman, and yet the court held the trust executed, there being nothing in the terms of the deed indicating a purpose to create a separate estate in Mrs. Epting. This was distinctly held necessary in that case to prevent the operation of the statute. Mr. Justice McIver, in discussing that question, says with great force: "It cannot be claimed that it was necessary in order to preserve the separate estate of the wife, for, as we shall presently see, no such estate is provided for in the deed, so that there is nothing in the fact that the conveyance is nominally made to a third person for the use of the wife." Chancellor

---

April Term, 1882.

---

Dunkin, in *Wilson v. Bailer*, 3 *Strob. Eq.* 260, in considering the same question, said: "The absolute terms in which the property is given to the wife, or the amplitude of her enjoyment, has never been deemed sufficient to create a separate interest in derogation of the common law right." He proceeds, further, to say: "The implication is, however, necessary when the estate is declared to be for the sole and separate use of the wife, although the words independently of her husband, or without the control of her husband, are not superadded."

Now there are no words in the deed under consideration which could possibly be construed as indicating a purpose to create a separate estate in Mrs. Howard. A life estate is first conveyed for the "use, benefit and behoof" of William S. Howard, Sr., with remainder at his death to the said Mrs. Howard, during her natural life, not even for the sole use and benefit of Mrs. Howard, but simply with remainder to her. These terms fall far short of creating a separate estate, and, under the ruling of *Bouknight v. Epting*, would have presented no obstacle to the operation of the statute of uses, even before the adoption of the constitution of 1868, with the provision therein in reference to the estates of married women.

The deed under consideration, however, was made in 1873, long after the adoption of the constitution of 1868. Section 8, Article XIV., of that instrument makes all property acquired by a married woman, after her marriage, a separate property. So that this deed could not have been intended primarily to create an estate of that sort. The constitution had this effect without any express intention to that end in the terms of the deed itself. The deed then must have been used simply as a mode of conveyance by which the legal title was vested in Mrs. Howard through the operation of the statute, protected and shielded to her by the constitution, although possessed of the legal title.

But the question at last, in this case, is not as to the character of the estate of Mrs. Howard, but that of W. S. Howard, Sr., the plaintiff. Where estates are conveyed to different parties in the same instrument, the statute may execute one and not the other. In the case of *Williman v. Holmes*, 4 *Rich. Eq.* 476, an



---

Opinion of the Court.

---

estate was granted in trust "for the sole use, behoof and benefit" of a married woman, Mrs. Davidson, for and during the term of her natural life, with remainder after her death. The court held that this was a separate estate for life in Mrs. Davidson, which the statute on that account did not execute; but that the remainder was executed, and although the fee was conveyed in terms to the trustees, the apt words to that end, to wit, to "their heirs and assigns forever" being used, yet the estate in the trustees was cut down to an estate *per autre vie* under the principle that the law will not permit the trustees to take a larger legal estate than is necessary to the performance of the executory trusts conferred upon them, it being an established rule, as was said by the court, "that trustees shall hold legal estates commensurate only with the necessities of the trusts. If the estate given to them is deficient, it will be enlarged by implication; if in excess, it will be cut down by the operation of the statute of uses, and such excess will pass to those in remainder."

So that whatever may be the proper construction of this deed in reference to the application of the statute of uses on the estates of Mrs. Howard and the children in remainder, there is no reason why it should not execute the estate of W. S. Howard, Sr., the plaintiff, vesting in him a legal estate for life, the fee possibly remaining in the trustee for the benefit of the married woman, and for the preservation of the contingent remainders to the children.

It does not follow, however, that because the remainders to the children are contingent remainders, the statute of uses could not apply. In the case of *Faber v. Police*, 10 S. C. 385, this very question was discussed, and the conclusion reached, sustained by a well-considered opinion and abundant authority, that notwithstanding the contingency of the remainders, yet the estate was executed in the life-tenant. That case was very similar to this, except that there was no married woman involved. It was a devise in trust for the use of A. during his life with contingent remainders over. The court held that under the statute of uses the legal estate vested in A.; that although the remainders provided for were evidently contingent, yet there being nothing in the terms of the will showing that

---

April Term, 1882.

---

the trust created to preserve these contingent remainders, such a trust could not be implied. In answer to the argument, that such an implication should arise on account of the contingency of the remainders, Mr. Justice McIver, who delivered the opinion of the court, said: "We know of no authority for such a position, and none have been cited. We are at a loss to conceive by what right a court could undertake to add to the words of a will, by which additional trusts to those which the testator has seen fit to declare, should be raised."

In our opinion, the use to W. S. Howard, Sr., was executed by the statute, through the operation of which he became the legal owner of the land in question for life. It will not be necessary to discuss the other questions raised in the appeal, as they all, more or less, hinge upon the matter herein above.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded.

---

GUNTER v. GUNTER.

1. A finding of fact by the Probate judge, concurred in by the Circuit judge, affirmed.
2. Where discretion given to executors under a will is unlimited, it cannot be controlled by the courts unless there be a manifest and flagrant refusal to exercise it, and with the view to defeat the intent of the will.
3. A testator directed his executors to convert the residue of his estate into money "and place it in bank, or safe hands, as they may think best, the interest to be applied for the education and maintenance of my two children. \* \* \* I repeat \* \* \* the remainder of property \* \* \* to be converted into money by my executors and put in bank or safe hands for the use of my two children as they may think best." *Held*, that the discretion given to the executors related to the investments, but that it was their positive duty to apply the interest of the invested fund to the wants of the children, which duty the court could enforce on the application of the children.
4. In construing a will, all the parts must be considered, and effect given to each in harmony, if possible.

---

Before HUDSON, J., Aiken, February, 1882.

---

Statement of the Case.

---

This was an action in the Court of Probate to require Uriel X. Gunter, sole qualified executor of the will of Daniel B. Gunter, to carry out its provisions. The will was as follows :

*In the name of God, amen !* I, Daniel B. Gunter, being of sound mind, and knowing the uncertainty of life, and the certainty of death, do make, declare and publish, this, my last will and testament, that as soon after my death as is convenient, that my funeral and burial expenses be paid. I then give and bequeathe unto my beloved wife, Amanda C. Gunter, and my two children, use of my home place on which I now live, to cultivate only, also all my farming tools, gears, hoes, axes, wagons, carts, stock of provisions now made and on hand, my mule, oxens, cows, hogs, household and kitchen, furniture, and one hundred dollars in money.

The above mentioned articles and property, I give to my wife as before mentioned on the following conditions, that is : she is to have it so long as she remains a widow and does not marry ; but if she marries any one then she forfeits her claim to all I give her. I direct that my executors on her marrying, sell the property given her, and place it to the benefit of my two children above mentioned. The above property to be appraised by three persons, so that my executors may know the amount given her. The balance of my property, excluding my monies, notes, accounts on books, and otherwise, cotton, goods, and all kinds of merchandise, in store, and all that I may leave, from any source including my mothers and brothers estates, and all lands excepting my home place above mentioned, I direct my executors to convert into money, and place in bank or safe hands, as they may think best, the interests to be applied for the education and maintenance of my two children above named, and if my executors think or is satisfied that the above interest and what I have given my wife is not sufficient for education, clothing, and other needs, they are to draw on the principal sufficient for the above requirements. My two children to share and share alike, and in case one should die, before becoming of age, or has any lawful children, then the other to heir the deceased one's share, and in case of the death of both, before becoming of age, or having any lawful children, in that case I direct that all my property, both personal and real, shall go to my two brothers Ucal and U. X. Gunter, and their heirs to share and share alike. Now that this my last will and testament, may be understood, I again repeat, that I have given to my wife, household and kitchen furniture, plantation tools, mule, oxen, cows, hogs, carts, provisions, and one hundred dollars in money, as above mentioned, during her

---

April Term, 1882.

---

widowhood, but if she marries she forfeits her claim to it, and to be disposed as I have directed. The remainder of property both real and personal including all monies, notes, accounts, cotton on hand, goods and merchandise in store, or on hand, and all that may come to me from heirship, rents or any wise, to be converted into money, by my executors, and put in bank or safe hands, for the use of my two children as they may think best, and in case of the death of my two children, as above mentioned, then my two brothers and their heirs to have all my property, both personal and real.

And I do hereby appoint my beloved brother Uriel X. Gunter and my relatives and friends, Seaborn Jones, John E. Jones and W. A. Lybrand, executors to this my last Will and testament.

Given under my hand and seal this 22d day of January, in the year of our Lord, one thousand eight hundred and seventy-three.

(Signed,)

DANIEL B. GUNTER. [L. s.]

Signed in the presence of }

U. X. GUNTER,

W. B. HUTTO,

JACOB HYDRICK. }

The case is otherwise fully stated in the opinion of this court.

*Messrs. Croft & Dunlap*, for appellant.

*Messrs. Henderson Bros.*, contra.

October 25th, 1882. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. Daniel B. Gunter, late of Aiken county, died in 1873, leaving a will. [Here follows a statement of the will.] At the death of the testator, his two children were infants of tender years, being, respectively, at the time of the filing of the petition below, nine and twelve years of age. Shortly after the death of the testator, his widow, Mrs. Gunter, seems to have been placed in possession of the home place, and the personal property bequeathed to her, the executors offering to her, from time to time, some little assistance in money for the maintenance of the children.

Things remained in this condition until 1881, some eight years after the death of the testator, when Mrs. Gunter, in her

---

Opinion of the Court.

---

own right, and as guardian *ad litem* of her two children, filed a petition in the Probate Court for Aiken county, complaining that the executor had not complied with the will in several particulars, and especially that he had failed to contribute to the education and support of the children out of the interest of the funds, directed to be put at interest for their benefit, and praying that the said executor might be required to account, and that she should have such relief as justice and equity demanded. The case was heard by the Probate judge, and after full investigation it was developed that the only matters of real contest were, whether the executor should be required to pay to Mrs. Gunter any sum for deficiency in the support, maintenance and education of the children for the eight years preceding the petition, and whether anything should be allowed in the future until the further order of the court, and if so, how much, in each case, per annum.

The Probate judge, upon the testimony, decreed that the executor should pay to the petitioner the sum of \$180 for the support of the children for the six years next after the death of the testator, \$140 for their support and education for the two succeeding years, and that in the future he should pay, annually, the sum of \$75, until the further order of the court, making the amount due the petitioner for past support and education, \$320, which, added to \$295.80, about which there was no dispute, amounted to \$615.80. From this decree the defendant appealed to the Circuit Court, alleging error in the findings of the Probate judge as to the amounts allowed the petitioner, and claiming as matter of law that it was in the discretion of the executor to make such allowances as he deemed to the interest of the children, having due regard to their estate. The Circuit Court affirmed the judgment of the Probate Court in all respects, and dismissed the appeal, with costs. From this judgment of the Circuit Court, the case now comes before this court on appeal.

Two questions are presented for our consideration, first, whether the amount decreed to the petitioner for the past and future support and education of the children, is more than the evidence justified; and, second, whether the discretion of the executor, as to this matter, was subject to the control of the

---

April Term, 1882.

---

court. The first being a question of fact, found by the Probate judge in the first instance and concurred in by the Circuit judge, this court will not disturb it under the decisions, unless there is manifest error in the finding, or the preponderance of testimony is against it. In looking through the evidence we see no such error; on the contrary, we think the evidence was quite sufficient to support the decree in this respect.

As to the second question, if it appeared from a proper construction of the will that the testator intended to leave the application of the interest on the fund which he directed to be invested for the benefit of his two children, entirely to the discretion of the executor, then the courts would not undertake to control that discretion, unless there was a manifest and flagrant refusal to exercise it, and with the view to defeat the intent and purpose of the will. A testator who, during his lifetime, has accumulated property, has the legal right to dispose of it as he sees proper, and, when he has done so, it would be an unwarranted and arbitrary exercise of power for any court to undertake to change, alter or modify in the least, such disposition. The law authorizes the citizens to make wills, but not the courts.

The question, then, in this case is: Did the testator leave the application of the interest on the fund mentioned solely to the discretion of the executor, and are the rights of the children as to that application dependent upon his will alone? On reading the will it cannot escape attention, that the children of the testator were especially and almost exclusively the objects of his bounty. He seems to have been so solicitous about their welfare as almost to have forgotten his wife, their mother. He gave his wife nothing, except the household furniture, some little stock and \$100 in money, and the right to cultivate for herself and the children the home place—all this to be forfeited to the children in the event of her second marriage. He then directs the balance of his property, both real and personal, to be converted into money, the interest to be applied to the education and maintenance of his two children, with the power on the part of the executors, if they thought best, or became satisfied that this was not enough, to encroach upon the capital.

This direction is in the second clause of the will. Under it,

---

Opinion of the Court.

---

if not subsequently modified, the children would have a right to appeal to the courts in case the executor neglected or declined to furnish aid to their annual support and education, and the matter would not depend upon the mere will of the executor, but upon the evidence as to the needs and wants of the children. The interest on the invested fund was to be theirs, as their wants and necessities might demand, and upon a proper showing that such necessity existed in each case, the courts could not hesitate to afford relief, because such would evidently be the intent of the testator, and the intent in all cases governs.

Was this portion of the will subsequently changed or modified so far as the rights of the children were concerned? Lower down in the will, the testator repeats his direction for the conversion of the remainder of his property into money, and that it be invested for the children, using this language, "that it be put in bank or safe hands, for the use of my two children as they may think best." Did the testator intend to apply the words "as they may think best" to the investment in the bank or safe hands, or to the use of the children? Standing alone and unaided by the previous bequest of this interest for the benefit of the children, this question would not be entirely free from doubt; perhaps the strict grammatical construction might require that the use of the children should be qualified by these words, "as they, the executors, may think best."

But in construing a will, all the parts must be considered, and effect given to each in harmony, if possible. Governed by this rule, and looking to the specific direction of the first portion, that the interest of the invested fund should be applied to the education and maintenance of the children, with direction to the executors to draw upon the principal, if that was not sufficient, we think it was the positive duty of the executors to apply the interest, and in case they declined, that the children had the right to apply to the courts, to enforce its performance, their right to relief being dependent upon the evidence submitted as to their wants and necessities. That course has been adopted in this case, and both the Probate Court and the Circuit Court having found, after full investigation, that the necessity existed to the amount decreed, this court will not disturb that judgment.

---

April Term, 1882.

---

It appears that the amount decreed for past support will not encroach on the original capital, nor will the allowance for the future support.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

---

HYATT v. MCBURNEY.

1. In 1857 B. purchased land from the executors of A., and gave bonds and mortgage for the purchase-money. B. sold to C. in 1862 for confederate money, and applied it to the payment of his bonds and mortgage, which were marked satisfied. C. then mortgaged this land to H. Afterwards, in suit brought in the United States Court by the heirs of A. against B. and C., and the executors of A. (H. not being a party), the payment by B. in confederate money was held by the Supreme Court to be fraudulent and void, and foreclosure was decreed of the mortgage of B. to the executors of A., the rights of H. being expressly declared to be not affected. In subsequent action by H. for foreclosure of his mortgage, *held*, that the validity of B.'s mortgage was not *res adjudicata* as to H.
2. A petition for removal of the cause to the United States Courts properly refused, the petition not having been filed in time, and the fact upon which the application was based not being made to appear from the record as a whole.
3. A finding of fact by the Circuit judge—that a payment made and received in confederate money was free from fraud—sustained.
4. A party purchasing lands from executors under a power given in the will, was discharged of his bonds and mortgage for the purchase-money by making payment of them to one of the executors, who surrendered the bonds and entered satisfaction on the mortgage, notwithstanding it appeared in the filed returns of the executors, that the bonds had been transferred to themselves, as trustees under the will, within a year of testator's death, no transfer, however, appearing upon the papers themselves.
5. It is settled in this State that payment of an *ante bellum* debt, made to an executor in confederate money, was not *ipso facto* void, and in all such cases the debtor, if not guilty of fraud and collusion, was discharged from his debt by the payment.
6. This case distinguished from *McDuffie v. McIntyre*, 11 S. C. 551.

---

Before PRESSLEY, J., Charleston, June, 1880.

This was an action by the executors and devisees of Edmund Hyatt, deceased, of the State of New York, against William



---

Statement of the Case.

---

McBurney, William Hasseltine, Alfred L. Gillespie and T. R. McGahan, members of the late firm of Hyatt, McBurney & Co., and Caroline Carson. The purpose of the action and the facts generally are stated in the opinion.

The petition for removal of the cause to the Circuit Court of the United States for the District of South Carolina, was based upon the allegation that the plaintiffs were citizens of New York and Spain, and the petitioner, Mrs. Carson, a citizen of Massachusetts, and the other defendants of South Carolina, Tennessee and California. The petition was not verified, but was supported by the affidavit of her attorney, James Lowndes, duly sworn to before a notary public, of Washington, D. C., which was as follows:

Personally appeared before me, James Lowndes, and made oath that he is the attorney of Caroline Carson, and has read her petition for the removal of the said cause to the Circuit Court of the United States for the District of South Carolina, and that the facts therein stated are true, to the best of his information and belief, save that he cannot aver that Dean Hall is of greater value than \$5,500; that his information as to the domicile of Hasseltine is drawn from a statement made to him by some person, whose name he cannot recall; that his information as to the domicile of Caroline Carson is drawn from these facts, viz., that about July 1st, 1877, he received in due course of mail a letter from the said Caroline Carson, dated at Brookline, Massachusetts, in which she informed the deponent that she had made a declaration or affidavit of her change of domicile from New York to Massachusetts; and that deponent continued to receive letters from her in the latter State during the month of July, 1877, and he knows her purpose to have been to become a citizen of Massachusetts; and he knows that she has not, in fact for many years, resided in New York.

Upon this petition, Judge Pressley signed the following order:

The plaintiffs in this case, except one, a Spanish subject, are citizens of the State of New York, and the controversy, as appears by the pleadings, is wholly between them and the defendant, Caroline Carson, who, in her answer, states that she is also a citizen of that State. She has also filed with her

---

April Term, 1882.

---

answer an exhibit of a previous case in the United States Court relating to the same matter; in which case she was plaintiff, suing as a citizen of the State of New York. No motion has been made by her for leave to amend or withdraw her answer, nor has any affidavit or other testimony been submitted showing that her answer was erroneous and the matter therein in reference to her citizenship was inserted by inadvertence or mistake.

After this case had been referred to the master, and after the filing of her said answer by the said defendant, and the master, attended by the attorneys for plaintiffs and said defendant, had finished taking the testimony offered by the plaintiffs, the said defendant filed a petition in this court praying a removal of this case to the Circuit Court of the United States, and alleging that she is a citizen of the State of Massachusetts. That petition is not properly verified, and the insufficient affidavit by her attorney does not state any matter which would justify me in disregarding the positive statement in her answer and exhibit.

I, therefore, hold that the controversy in this case is between a citizen of the State of New York on the one side, and other citizens of the same State and a Spanish subject on the other side; and, further, that the petition of defendant for the removal of the case was not filed until after the trial had commenced. She is, therefore, not entitled to have the case removed from this court, and her motion to that effect is refused.

Upon the merits, Judge Pressley filed the following decree:

In this case plaintiffs seek to foreclose their mortgage on Dean Hall plantation, which secures a debt due them by McBurney & Co. Their co-defendant, Mrs. Carson, held an older mortgage on said plantation, which one of the executors to whom the mortgage was given, satisfied during the late war. That satisfaction was set aside as fraudulent and void by the Supreme Court of the United States, in a case to which McBurney & Co. were parties, but plaintiffs here were not parties to that case.

I find here, not a shadow of fraud, either in the circumstances attending the said satisfaction, or in the nature of the payment, and the very high character of all parties to that transaction, would rebut even strong proof of fraud, if such had been produced in the case. In the absence of all proof in that respect, I

---

Statement of the Case.

---

follow the decisions of the Supreme Court of this State, and hold that plaintiffs have a valid mortgage on said plantation, discharged of the said older mortgage.

But the obligors of the bond which plaintiffs' mortgage secures, being parties to the decision of the United States Court, are bound by it. It is a final adjudication of their rights, which I am bound to respect. In doing so, I must give it full effect if that can be done without impairing the lien of the plaintiffs. They are not entitled to enforce payment of their bond out of property which the said decision gives to Mrs. Carson, if they can, without difficult or expensive litigation, enforce payment by the obligors, who are bound by the said decision. Were I to decree that, my profession of respect for that decision would be only a flimsy pretense.

It is, therefore, ordered that this case be recommitted to Master Clancy, to take testimony and report whether the plaintiffs can, without difficult or expensive litigation, procure payment from the obligors of said bond otherwise than by the foreclosure of their said mortgage.

The code, as construed by the Supreme Court of this State, requires that every case, without regard to the pleadings, be decided according to right. To that end leave must be granted to amend the pleadings, even after the hearing. If Mrs. Carson be advised that amendment of her answer be necessary, leave to amend it according to the claim set up by her at the hearing, is hereby granted.

An appeal taken by plaintiffs from this decree has been heretofore heard by this court, and will be found reported in 15 *S. C.* 393.

To this decree the defendant, Mrs. Carson, also excepted, but did not at that time prosecute her appeal. Her exception was as follows:

The defendant, Caroline Carson, excepts, for the purpose of an appeal to the Supreme Court, to so much of the decree of his Honor Judge Pressley as decides that the plaintiffs have a valid mortgage on the property mentioned in the pleadings, or any lien thereon, superior to the mortgage of Ball to the executors of Carson; which, in the case in the Supreme Court of the

---

April Term, 1882.

---

United States, to which McBurney, the mortgagor, was a party, was adjudged a subsisting mortgage when McBurney became purchaser of the property, and prior to the date of the mortgage to the plaintiff's testator.

Upon the return of the cause to the Circuit Court, Judge Kershaw passed an order for foreclosure and sale, and defendant, Mrs. Carson, excepted and appealed upon the grounds stated in the opinion. A motion by plaintiffs to dismiss this appeal was refused. 17 S. C. 145.

*Messrs. A. G. Magrath, H. E. Young, for appellant.*

*Messrs. McCrady & Sons, contra.*

October 28th, 1882. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The facts of this case, not controverted, are as follows: Edmund Hyatt, late a citizen of the State of New York, together with William McBurney, William Hasseltine, Alfred S. Gillespie and Thomas R. McGahan, in December, 1862, and for some time prior, were copartners, doing business under the name and style of Hyatt, McBurney & Co., in the city of Charleston. In December, 1862, this firm purchased from one Elias N. Ball a certain plantation, located in Charleston county, known as Dean Hall, for \$100,000, which was paid in confederate treasury notes. This land had been purchased by Ball in 1857 from the executors of William A. Carson, deceased, partly for cash and partly on a credit, the credit portion being secured by a mortgage of the premises executed to said executors, and it was the understanding between McBurney & Co. and Ball, that he would extinguish this debt, and have the mortgage delivered up and canceled. This was done by Ball, with so much of the confederate money received by him from McBurney as was necessary. This transaction took place between Ball and one of the executors, Robertson, the other of the two who had qualified having, before that time, left the State.

In May, 1863, the copartnership of Hyatt, McBurney & Co., being about to expire, Hyatt sold his interest in the concern and

---

Opinion of the Court.

---

in the "Dean Hall" place to the other members of the firm, in consideration of \$40,000, and withdrew, this sum being secured to the said Hyatt by the bond of the new firm, with a mortgage of the "Dean Hall place."

This place had formerly belonged to William A. Carson. Carson died in 1856, testate, leaving a widow, Mrs. Caroline Carson, and two minor sons, William and James Petigru Carson. In his will he appointed Alexander Robertson and John Freer Blacklock his executors, and, after making certain specific bequests, he directed his executors to sell the residue of his estate, the proceeds to be applied, first, to the payment of his debts, and then the balance to be divided into three equal parts, one-third to be held by them in trust for his wife, Caroline, during her life, and the other two-thirds for his sons, William and James Petigru, to be paid to them, absolutely, on their attaining their majority. Under this power of sale, with which the executors were invested, Alexander Robertson and John Freer Blacklock, after qualifying, proceeded to sell the estate, selling the "Dean Hall place" to Elias N. Ball for \$50,000, the larger portion being on a credit, which was secured by mortgage of the premises, executed on March 2d, 1857.

After the late war between the States had ended, to wit, on August 11th, 1866, Mrs. Carson, who had become the owner of her sons' interests under the will of their father, and who was living in the State of New York, instituted in her own name proceedings in the Circuit Court of the United States for the District of South Carolina, to have the bonds of Ball surrendered by Robertson, the executor, declared valid and subsisting securities and the mortgage given to secure them a valid and subsisting lien on "Dean Hall" (notwithstanding it had been canceled), and praying a foreclosure thereof.

To this proceeding, all of the members of the late firm of Hyatt, McBurney & Co., were made parties, except Hyatt, who could not be impleaded, because he was a citizen of New York, of which State the plaintiff was also a citizen. The case was, however, heard as to the other parties, the Circuit Court sustaining the complaint of the plaintiff, and ordering the foreclosure, which decree, upon appeal, was ultimately affirmed by the

---

April Term, 1882.

---

Supreme Court of the United States, at its October term, 1878. 99 U. S. 571. The judgment of the court was based in part on the ground of fraud, in the transaction between McBurney & Co., Ball and Robertson expressed in the following strong terms, as found in the opinion: "There was evidently a plot; McBurney & Co. were its contrivers, Ball was its instrument, Robertson was their dupe, and the Carsons the victims." Under this decree, "Dean Hall" was sold by the marshal for the District of South Carolina, on November 26th, 1879, Mrs. Carson being the purchaser.

In the meantime, to wit, on October 15th, 1879, the plaintiff, as executrix, executor, and heirs-at-law of Hyatt, then deceased, instituted the action below, for the foreclosure of the mortgage from McBurney and Gillespie to the said Hyatt, above referred to. To this action Mrs. Carson was made a party defendant, who, failing to answer within the required time, the case as to her was placed on Calendar 6, for judgment. She, however, afterwards appeared, and was granted on December 16th, 1879, further time to answer, she consenting to an order of reference. The answer was filed on January 31st, 1880, thereafter.

In this answer, Mrs. Carson, after stating the death of her husband, the fact that he left a will, the sale by his executors of the Dean Hall place to Ball, and several other unimportant facts, avers, that on and before June 4th, 1857, all the debts of the estate having been paid, the executors made distribution of the assets, and transferred to themselves, as trustees under the will, the Ball bonds and mortgage, to wit, to themselves, as trustees of herself, one bond of \$9,000, and one-third interest in one bond of \$4,000, and to themselves, as trustees of her two sons, the same amount for each in bonds, making, in the aggregate, \$31,000 in bonds, and that they then took and held, as said trustees, the mortgage of Dean Hall, securing the said debt of \$31,000. That the said mortgage was not satisfied until July 21st, A. D. 1866, when, she alleged that, Robertson alone, and at the instance of McBurney, executed a satisfaction on it. That at the time of the surrender of the Ball bonds by Robertson, they could have been exchanged in the market for more than double the amount in confederate treasury notes of their

---

Opinion of the Court.

---

face value; and, finally, she interposed the decree of the Supreme Court of the United States, and claimed that the plaintiffs were estopped by that decree from denying the validity of the said bonds and mortgage, held by Robertson, as trustee as aforesaid, or their priority to that of plaintiffs, and that this plaintiff could not enforce their mortgage without first redeeming the Ball mortgage.

The case, as has been stated, was referred to the master, who proceeded to hold the reference, when, after one or two sittings, Mrs. Carson, through her attorney, gave notice to the master, that he had that day filed a petition in the clerk's office, praying, among other things, the removal of the cause into the United States Court, and that he would not continue the reference before him. Whereupon the attorney of the plaintiffs moved that the master file his report of the testimony taken.

Under this state of things the case came on for hearing before Judge Pressley, who dismissed the petition for removal, holding that the defendant, under the circumstances, was not entitled to the motion, it appearing in the answer by her own statement that she was a citizen of the same State as the plaintiffs, the State of New York, and no affidavit being submitted that this statement was erroneous or inserted by mistake; and, further, that the petition came too late, it having been presented after the filing of her answer in the cause, and after the master, attended by the attorneys on both sides, had finished taking the testimony offered by the plaintiffs; and, moreover, that the petition was not properly verified, the affidavit of the attorney not being sufficient to justify him in disregarding the positive statement in the answer of Mrs. Carson as to her citizenship.

Judge Pressley then proceeded to hear the case on its merits, finally pronouncing a decree, in which he stated, "that he found not a shadow of fraud, either in the circumstances attending the satisfaction or in the nature of the payment, \* \* \* and that, in the absence of all proof in that respect, he would follow the decisions of the Supreme Court of this State, and hold that plaintiff had a valid mortgage on said plantation, discharged of said older mortgage." Upon the findings in this decree, a judgment of foreclosure in favor of the plaintiffs was ultimately pro-

---

April Term, 1882.

---

nounced by the Circuit Court. And now from this judgment this appeal has come.

The appeal is urged upon four grounds: First, that the judgment of the Supreme Court of the United States, in *McBurney v. Carson*, 99 U. S. 571, is conclusive of the case, on the principle of *res adjudicata*; second, that the court below should have let go its jurisdiction upon the filing of the petition for removal by the defendant, and upon the facts therein stated; third, "that Judge Pressley erred in holding that he found not a shadow of fraud either in the circumstances attending the satisfaction of the mortgage or in the nature of the payments," and, fourth, that he erred "in holding that the plaintiffs had a valid mortgage on said plantation, discharged of the said older mortgage." These grounds we will consider in the order in which they are stated.

We have been somewhat surprised at the earnestness with which the appellant has pressed upon the court the first ground of appeal, in the face of the language of the decree which she invokes. How could the Supreme Court of the United States have expressed more distinctly its own opinion, that the rights of Hyatt were not being adjudicated in the cases of *Carson v. Robertson* and *McBurney v. Carson*, than in the following language found in the opinion: "If he (Hyatt) shall not be made a party and the complainant shall be successful, his rights will not be affected by the decree. In such case he can file a new and independent bill, and renew the litigation as to all the questions touching the prior mortgage which are involved in this controversy. The complainant has the option to make him a party, or to proceed without him, and take the hazard of the consequences." *Robertson v. Carson*, 19 Wall. 106: Could language be stronger, or more direct to the point?

Again, the court said: "This court has held that Hyatt was not an indispensable party, as the decree would not affect his rights." *McBurney v. Carson*, 99 U. S. 569. Mr. Justice Swayne, who delivered the opinion of the court in both of these cases, in support of the principles announced, refers to *Haines v. Beach*, 3 Johns. Ch. 459, where Chancellor Kent, speaks as follows: "The necessity of making the subsequent encum-



## Opinion of the Court.

brancers parties, or holding their rights unimpaired, appears to be much stronger, and is indispensable to justice in cases of decrees for sale according to our practice, for otherwise the mortgagor would take the surplus money, or the cash value of the equity of redemption, and defeat entirely the lien of the subsequent creditor. But their rights cannot be destroyed in this way, and the purchaser will take only a title against the parties to the suit, and he cannot set it up against the subsisting equity of those encumbrancers who are not parties." The court seems to have anticipated that the question of *res adjudicata* might arise in future as to Hyatt, and to prevent its interposition, and to free it from all doubt, these strong expressions appear to have been used. See also *Horn v. Lockhart*, 17 Wall. 570.

It will not do to say that these expressions were *obiter*, because the very question in the case of *Robertson v. Carson* was, whether Hyatt was an indispensable party, which necessarily involved the further question as to the effect of the judgment of the court upon Hyatt's rights and interests. Instead, therefore, of the case of *McBurney v. Carson* being *res adjudicata* against Hyatt, and concluding him, it is rather *res adjudicata* for him—rather a judicial determination that he has not been concluded—and that all the questions, both of law and fact, involved in that case, though decided against the parties before the court, were especially left open for him.

But, independent of this, the authorities relied on by the appellant, failed to sustain her position. It is true, no one can doubt the propositions announced in appellants' argument, to wit, that "such effect as would belong to a judgment of the courts of this State, should be given to the judgments of the courts of the United States, rendered under similar circumstances." *Dupasseur v. Rochereau*, 21 Wall. 135. "That judgments of the courts of the United States, when relied on in the State courts, have the same effect as judgments of the other States." *Story Confl. L.*, Sec. 609. That "Circuit and District Courts of the United States, certainly cannot be considered as foreign in any sense of the term, either in respect to the State courts in which they are, or as respects the Circuit or District Courts of another circuit or district. On the contrary, they are

---

April Term, 1882.

---

domestic tribunals, whose proceedings all other courts of the country are bound to respect." 95 U. S. 423. "That full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." Art. IV., Sec. 1 Const. of U. S.

These are all sound as general rules, and this court will never wantonly or heedlessly violate the spirit which they breathe. It fully recognizes the fact that the judiciary organized under the general government, as well as that of all the States, is engaged in the same great work for the advancement of the interests and the welfare of a common country, and not only will full faith and credit be given here to the proceedings of the courts elsewhere, but all due respect will be paid to their judgments.

In reaching our conclusions, we are willing to be aided from any quarter, and especially do we rely upon the opinions pronounced by learned and distinguished judges elsewhere. But do these principles warrant the conclusion, which the appellant seeks to draw from them, as applicable to the questions involved in her appeal? We think there is a wide gap between them as premises, and the conclusion which the appellant desires this court to enforce. She invokes, in substance, the plea of *res adjudicata*. The question for this court then to determine is not whether we shall pay proper respect to the judgment of the Supreme Court of the United States, but whether, according to the principles which govern the plea of *res adjudicata*, it is applicable to this case.

What are those principles? They have been recently laid down by this court, as we understand them, in the case of *Mauldin v. Gossett*, 15 S. C. 565. We held, in that case, for this plea to be effective, the concurrence of four conditions was required, first, identity of the thing sued for or in controversy; second, identity of the cause of action; third, identity in the persons or parties, and, fourth, identity in the quality of the persons for or against whom the claim is made. And this court said: "If any one of these unities is wanting, and especially the unity of parties, the plea cannot be made out, because, while

---

Opinion of the Court.

---

it is just and proper that litigation between the same parties, after they have once had their rights adjudicated by a competent tribunal without appeal, should end, yet, a thing done between others ought not to injure another. A transaction between two parties ought not to operate to the disadvantage of a third. The maxim, *res inter alios acta nocere non debet*, is as strong for the protection of those not before the Court, as that of *res adjudicata* for those who are present."

These four unities are all necessary to the plea of *res adjudicata*; but of the four, that of parties is perhaps the most important. In fact, it is absolutely essential, because the court has no jurisdiction over one not before it. Here, it was a recognized fact that Hyatt was not before the court. The necessity of his presence was one of the questions in the case, the court holding, as has already been stated, that this was not indispensable as to the rights of those who were present, but expressly declaring that Hyatt could not and should not be prejudiced. In several of the cases cited by appellant, the parties were the same in both courts. Such was the fact in *Christmas v. Russell*, 5 Wall. 290; *Mills v. Duryea*, 7 Cr. 483; and *McElmoyle v. Cohen*, 13 Pet. 324. And the question was, what effect should be given to the proceedings of the first court in such cases. The principles announced in these cases are not controverted, but they have no application here.

In *Dupassey v. Rochereau*, 21 Wall. 135, the facts were somewhat similar to the facts here. "Judgment had been rendered by the Circuit Court of the United States for a party, declaring that his mortgage was the first lien on the land, and the marshal sold the property clear of all prior liens, the mortgagee being the purchaser. This judgment and sale was set up by way of defense to a suit brought in the State court by another mortgagee, who claimed priority to the first mortgage, and who had not been made a party to the suit. The State court held that the plaintiff was not bound by the former judgment on the question of priority, not being a party to the suit. The case was brought to the Supreme Court of the United States by writ of error, and that court held that the State court did not refuse to accord due force and effect to the judgment; that such a judg-

---

April Term, 1882.

---

ment in the State courts would not be conclusive on the point in question, and the judgment of the Circuit Court could not have any greater force and effect than judgments in the State courts." Extract from syllabus of *Dupasseeur v. Rochereau*, 21 Wall. 130.

In *Green v. Van Buskirk*, 5 Wall. 307, Van Buskirk was held bound by a proceeding to which he was not a party, and this, at first view, would seem in conflict with the position taken above, but upon an examination of the case, this, we think, will be found to be a mistake. Bates owned certain safes at Chicago. These he mortgaged to Van Buskirk, in the State of New York, but the mortgage was not duly recorded in Illinois, and possession was not delivered to Van Buskirk. Green attached the safes in Chicago, after the date of the mortgage to Van Buskirk, and sold them and received the proceeds. Van Buskirk sued Green, in New York, for these proceeds. Green pleaded the proceedings in Illinois. The court in New York disregarded the Illinois judgment, and decreed for Van Buskirk. The Supreme Court of the United States held that this was error, and that the judgment in Illinois was binding upon Van Buskirk, although he was not a party to that proceeding. This decision, however, was based upon the fact that in the proceedings in Illinois, the court there had given construction to the law of Illinois as to recording mortgages and the necessity of delivery of property to pass the title, which construction, upon a familiar principle, was binding upon other courts, and, therefore, should not have been disregarded by the court in New York. But the court also held, that, notwithstanding the proceeding in Illinois adjudicating the safes to Green, Van Buskirk would still have the right to set up title to the property if he had such as was superior to that conferred by the attachment proceedings in Illinois, and, further, that he had the right to show that the property was not liable to attachment, from all of which he would have been barred had he been a party to that suit. In other words, he was bound by the construction of the Illinois statute by the Illinois court, but not by the facts of a case to which he was no party. This case, thus understood, fails to support the appellant.

---

Opinion of the Court.

---

We feel constrained to overrule the first ground of appeal, both upon principle and authority.

Second. Did Judge Pressley err in refusing the removal of this cause to the Circuit Court of the United States for the district of South Carolina? Judge Pressley, in his order refusing the motion to remove, gives the reasons for his action. They seem to us to be quite sufficient, and to be sustained by authority. It did not appear from the record of the case, to the satisfaction of Judge Pressley, that the parties were citizens of different States. Nor was the petition filed within proper time, as required by the act of congress. Chief Justice Waite, in the *Railway Co. v. Ramsey*, 22 Wall. 328, said: "To obtain a transfer of a suit, the party claiming it must file in the State court a petition therefor, and tender the requisite security. Such petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the Circuit Court would have jurisdiction of the suit when transferred. The one necessarily includes the other. If, upon the hearing of the petition, it is sustained by proof, the State court can proceed no further."

The facts stated in this petition were, perhaps, sufficient to entitle the petitioner to the order, had the petition been filed within proper time and had the facts stated been sustained by the record as a whole, but the petition broke down at both of these points. It was not filed as required by the act of congress (1875) at or before the term at which the suit could have been tried, nor did it appear upon the face of the record that the citizenship of Mrs. Carson was in Massachusetts. True, this fact was stated in the petition, but her answer distinctly states that she was a citizen of New York. Thus, the record on its face fails to show the important fact required for removal. *Meyer v. Construction Co.*, 100 U. S. 457. Hence, Judge Pressley had no other alternative but to dismiss the petition upon both of the grounds mentioned.

Third. Appellant insists that Judge Pressley erred in holding as follows: "I find here not a shadow of fraud, either in the circumstances attending the said satisfaction, or in the nature of the payments." We have carefully examined the evidence

---

April Term, 1882.

---

reported by the master, and upon which Judge Pressley heard the case, and we not only fail to see that his finding of fact in this respect is either without evidence, or opposed to its preponderance, one of which is necessary under our decisions to reverse it; but, on the contrary, we concur with him, that there is not a shadow of evidence in the case tainting the transaction with moral fraud and corruption, either as he stated in the satisfaction of the mortgage, or in the nature of the payments. No one knowing the parties and having the testimony before him, which Judge Pressley had, especially that the late lamented James L. Pettigru, the father of Mrs. Carson, and grandfather of the other two beneficiaries, under W. A. Carson's will, not only had full knowledge of the whole transaction, but desired and approved its consummation, could, for a moment, believe, that it was conceived and perpetrated in fraud.

It is true that the settlement was based on confederate treasury notes, which soon thereafter turned to ashes; but at that time, there was no other medium of exchange in this Southern country. The fortunes of war had driven every other from our midst. It had become, from necessity, the currency of the courts, judicial sales, banks and bankers, professional men, merchants, and all classes of business. It was received for labor and all kind of service, and property of every species, real and personal, constantly changed hands upon it. It paid notes, bonds and judgments, and was for years the very life-blood of the people in all their business relations. If simply the use of this money by them is enough to fix fraud upon McBurney, Ball and Robertson, in a legitimate transaction, thus completed in open day-light, and in the very presence of the nearest relative of the parties, who at that time was the acknowledged head, not only of the bar of South Carolina, but of the entire south, and with few equals anywhere, and equally as distinguished for his high personal integrity and abhorrence of fraud, then the people of the Southern States, as a whole, were steeped in fraud during the war, because everybody, without exception, used it then. We see no error in this finding of the Circuit judge, upon the evidence before him.

Fourth. Did the Circuit judge err in holding that the plaintiff-

## Opinion of the Court.

iff had a valid mortgage on Dean Hall, discharged of the Ball mortgage? This part of Judge Pressley's decree is assailed upon three grounds, first, that the Ball bonds and mortgage had been transferred by the executors from themselves, as such to themselves as trustees, under Carson's will in 1857, and, therefore, Robertson, one of the executors, had no legal right to receive payment of these bonds, or to cancel the mortgage in 1862; second, that Robertson, as one of the executors, had no right to act alone, even if the bonds and mortgage were still in their possession as legal owners, because, being in that event joint owners, neither could act alone; third, that in no event could the debt of Ball be legally discharged by the executors in such currency, without the consent of the *cestuis que trust*. In other words, the appellant contends that the executors were trustees, and, that, therefore, they could not, even as executors, receive payment of the Ball debt in anything but legal currency.

To entitle the first ground to consideration, the fact upon which it is based should appear as an established fact in the case, to wit, that the bonds and mortgage of Ball had actually been assigned by the executors to themselves, as trustees, before the payment by Ball. This was a question of fact involving at the same time the question of law, whether at the time of the alleged transfer it was legally competent for the executors to make such a transfer. The will directed that the proceeds of the sale of the property should first be applied to the payment of the testator's debts, and then the residue to be divided and held in trust by his executors for his wife and children. Under our law, executors and administrators are allowed one year to ascertain the indebtedness of the estate, and the courts will not take judicial cognizance of proceedings instituted for the purpose of making distribution of the estate of the deceased, until after the expiration of one year from his death. So said Chancellor Dunkin, in *Adger v. Adger*, MS. Dec., Charleston, 1859, p. 252. In this case, Carson died on August 17th, 1856. It is claimed that the transfer was made June 22d, 1857. This was within the year, and was premature.

But independent of this legal question, has the fact of the assignment been legally established in such way that Judge

---

April Term, 1882.

---

Pressley could not have disregarded it as a fact? Judge Pressley does not state his finding upon that question, but we think the testimony was hardly sufficient to establish this fact. The only evidence upon the subject was the returns of the executors filed in the Probate Court. There was nothing upon the original papers, which were the subject of transfer, showing the assignment. The executors had not been discharged by any official act of the Probate judge, nor any notice given that the duties of trustees had been assumed by them. The papers had been originally executed to Robertson and Blacklock, as executors, and they still appeared upon their face to belong to these parties in the same capacity.

Under this state of facts, in our opinion, the testimony was not sufficient to establish the transfer claimed, and, on that account, the ruling of Judge Pressley is not obnoxious to the first objection. But even if the transfer had been regularly made, would it defeat the payment made by Ball if that payment was free from fraud and collusion and otherwise legal? This would be a fraud upon Ball. Finding his bonds in the hands of those to whom he had executed them, with no mark of transfer and nothing whatever to excite suspicion, he was fully justified in acting upon the representation that they were still the legal owners. He knew no one in the transaction but the executors. They were his creditors. He found his bonds and mortgage in the possession of one of them, the other having left the State, and he paid off the debt and canceled the mortgage. If this payment was otherwise legal no court could disturb it. This was not a case where the debtor was bound to see to the application of the fund at his peril. The executors had full power under the will to sell the estate and receive payment, and it was no business of the purchasers to follow the funds to their directed destination. *Laurens v. Lucas*, 6 Rich. Eq. 226.

It is not necessary to discuss the second ground above. It is familiar law, that executors are not bound to act jointly in receiving payment of debts due them as such, or the estate. In most respects, the act of one is the act of all. Either can release or pay a debt. 2 Wms. Ex. 946; *Earle v. Anderson*, 9 S. C. 460; *Tompkins v. Tompkins*, ante 1. This is not denied by the appel-



## Opinion of the Court.

lant. In fact it is admitted in the argument, and it has only been referred to herein, because, in the answer, the ground is taken that Robertson alone executed the satisfaction on the mortgage.

This brings us to the consideration of the last ground urged against this last holding of the presiding judge. Could the executors legally receive confederate currency in payment of the Ball bonds, and thereupon execute satisfaction of the mortgage? This is independent of the question of actual fraud, and raises the point whether it is competent for executors, or any other trustees having charge of the estates of others, to settle with the debtors of such estates, upon any other basis than legal currency. Not whether such settlement is a breach of trust on the part of the trustees, but whether the debtor can be discharged, except upon the payment of legal currency.

Many vexed and anomalous questions have grown out of the use of confederate currency during the war by the people of the Southern States, and numerous decisions are found in our own reports upon this subject, both before the adoption of the constitution of 1868, and since. While among these cases, several are found where trustees have been held liable (under certain circumstances) for a breach of trust in receiving this currency, not a single case appears where the debtor to the trustee has been made to repay his debt, once paid in such currency in the absence of all fraud and collusion between the parties. The old court, as organized before reconstruction, as well as the court as organized since, has invariably held that executors and administrators, being the legal owners of estates under their charge, have all the rights of such owners, so far as their relations to third parties are concerned; and while they may be held responsible to their *cestuis que trust* for failing to observe proper care and legal prudence in the discharge of their fiduciary duties, either in the collection or investment of the bonds under their control, or otherwise; yet, where the transaction is free from fraud, the *cestui que trust*, if he feels aggrieved, must look alone to the trustees for redress. He cannot push the trustees aside, and assail his debtor.

This seems to have been well settled in this State, so far as a

---

April Term, 1882.

---

series of decisions of the court of last resort can settle a principle. Out of the many cases found in the reports in which the subject of confederate currency and confederate transactions has been discussed, the following are referred to as especially bearing on the question now before the court: *McPherson v. Gray*, 14 *Rich. Eq.* 128; *Wiseman and Finley v. Hunter*, *Ib.* 175; *Mayer v. Mordecai*, 1 *S. C.* 399; *Sanders v. Rogers*, *Ib.* 452; *Creighton v. Pringle*, 3 *S. C.* 97; *Cureton v. Watson*, 3 *S. C.* 458; *Chalk v. Patterson*, 4 *S. C.* 98; *Singleton v. Lowndes*, 9 *S. C.* 465; and *State v. Moseley*, 10 *S. C.* 1—the two former of which were decided by the old court before the constitution of 1868, the others, since.

In most of the cases, the main question was whether the trustee had committed a breach of trust in receiving confederate money, and thereby discharging their debtors. The question being determined upon the principles applicable to the duties of the special trust, such as good faith, reasonable diligence, a proper observance of the terms of the trust, and of the law prescribing the duties of trustees; but in several the precise question under discussion was considered and adjudged; and, we think, that those of the first class, in which the trustee has been held liable, negatively sustains the discharge of the debtor, as fully as the second class does affirmatively, because the only ground upon which the trustee could be held responsible as for a breach of trust, is the fact that he has discharged the debtor. If the debtor has not been discharged, then no injury has been done, and no breach of trust committed. Thus all of these cases may be regarded as authority for Judge Pressley's holding, now under consideration.

In *McPherson v. Gray*, 14 *Rich. Eq.*, a decree on creditors bill, made in 1859, directed the master to sell testator's estate for one-third cash, and the residue on a credit, secured by mortgage, the debts to be paid out of the proceeds, and the residue, subject to the trust of the testator's will, to abide the future order of the court. The master made the sales, and took from the purchaser of a plantation his bond for a large sum of money, with mortgage. In January and March, 1864, the purchaser paid the bond to the master in confederate treasury notes—a

## Opinion of the Court.

currency which at that time had greatly depreciated, but which was the only currency in the country. The court, concluding that the payment was made in good faith, held that neither the purchaser nor the master was liable to the beneficial owners of the bond, Wardlaw, A. J., delivering the opinion of the court.

There is a striking similarity between this case and the case now before the court. In both cases, land was sold before the war, partly for cash and partly on a credit, and a mortgage taken to secure the credit portion of the sale, the proceeds of the sale first to be applied to the debts, the residue to be held subject to the trusts of testator's will. In both, the purchaser paid the purchase money in depreciated currency—confederate notes—the first being paid in 1864, the latter in 1862. In both, there was an entire loss to the *cestuis que trust*. In both, the payments were made in good faith. In the first, the court, consisting of Dunkin, Wardlaw and Glover, the latter sitting in the place of Inglis, concurred in holding that neither the purchaser nor the master were liable to the beneficial owners of the bond, and why should not such be the holding in the present case? There is no difference whatever between the two cases, except that, in the present case, Robertson was an executor, deriving his authority to sell from a will; and, in *McPherson v. Gray*, Gray was the master in equity, deriving his authority to sell from an order of the court. The trusts to be discharged were the same, and both were trustees. Executors, we suppose, are trustees, and Mr. Justice Wardlaw said in terms that "Mr. Gray, the master, was a trustee." *McPherson v. Gray*, p. 130, *supra*.

In *Wiseman and Finley v. Hunter*, 14 Rich. Eq. 167, under an order made in June, 1861, to collect a certain bond, dated in January, 1860, with as little delay as possible, the commissioner, in August, 1862, received payment in confederate treasury notes. In May, 1863, the commissioner reported that he had collected the bond, and, on motion of the solicitor of the parties entitled to the fund, an order for distribution was made. Two of the parties resided in Tennessee, and did not receive their shares, and they sought to have the payments opened and to compel the obligor to pay their shares. The court held that the obligor was discharged by the payment, and that the transaction could

---

April Term, 1882.

---

not be opened. This was in 1868, when Dunkin, D. L. Wardlaw and Inglis composed the court. "Debtors have rights as well as creditors," said the president of the court (Dunkin) in delivering the opinion, and, further, "where a transaction has been consummated and rights vested, the repose of society demands that it should not be opened." True, in this case the commissioner had been ordered to collect with as little delay as possible, and, at the instance of the solicitor of the parties, by a subsequent order distribution had been directed, but there was nothing said in either of these orders about confederate treasury notes.

*Mayer v. Mordecai*, 1 S. C. 383. By deed made in May, 1860, three bonds secured by mortgages of real estate were assigned to B. in trust, to invest the proceeds as soon as received in such manner as the said B. may think proper, on consultation with the *cestui que trust*. The *cestui que trust* removed shortly afterwards from South Carolina, where the trust was created, to New York, and remained there during the war with the Confederate States. In 1862 and 1863, B. collected the bonds in confederate treasury notes, then much depreciated, and invested the proceeds in bonds of the Confederate States, without consultation with the *cestui que trust*. Held, that B. committed a breach of trust in receiving payment of the bonds in confederate treasury notes and in investing the proceeds in bonds of the Confederate States, and that he was liable to account to the *cestui que trust* for the sums received. Held, further, that the obligors on the bonds were not liable to account to the *cestui que trust*, for they were discharged by their payments to B.

Here, unlike the cases above, the trustee was held liable, on the ground that he had acted without consultation with the *cestui que trust*, which the deed expressly required, but the obligors, as in the other cases, were protected. This case was heard in 1869, when Moses, Williard and Hoge composed the court. Chief Justice Moses delivered the opinion, saying: "That although the trustee is not discharged from liability to account for the three bonds, yet the mortgage as against the original debtors cannot be set up as of force. The legal title to the bonds was in him, and with the investment of the proceeds

## Opinion of the Court.

they had no concern." And again: "If, according to the ruling in this State, a vendee is not bound to see to the application of the purchase money (*Laurens v. Lucas*, 1 Rich. Eq. 226; *Lining v. Payton*, 2 DeS. 375), or a mortgagee, under the order of the court, that the money is appropriated to the purpose for which the mortgage was taken (*Spencer v. Bank of State, Bail. Eq.* 468), much less can a debtor who makes satisfaction to the creditor in a manner acceptable and agreed to by him, in the form of actual payment, be held to such requisition"—quoting what Mr. Justice Inglis said in the case of *Austin v. Kinsman*, 13 Rich. Eq. 265, to wit: "That a creditor, though entitled to demand payment in lawful money, may waive his right and accept any substitute he pleases, and by voluntary acceptance of such substitute as payment, makes it so." *Mayer v. Mordecai*, p. 398, *supra*.

In *Sanders v. Rogers*, 1 S. C. 452, the trustee was held liable for collecting, in 1863, well secured bonds, and failing to invest as the instrument creating the trusts directed, but there was no intimation that the payment by the obligor was invalid, or that the bonds had not been extinguished thereby. The case of *Creighton v. Pringle*, 3 S. C. 77, is to the same effect. In *Chalk v. Patterson*, 4 S. C. 98, it was held that the commissioner in equity was not liable, and, in *State v. Moseley*, 10 S. C. 6, that the sheriff was exempt from responsibility in receiving confederate money in satisfaction of an execution in his office.

These cases (and many others might be cited) establish the principle that executors and administrators and quasi-trustees, such as commissioners, masters and sheriffs, had authority during the war to receive the only currency which was then in existence, in satisfaction of bonds, notes and mortgages under their control, where the payment was made by the debtors free from fraud and collusion. Clearly, that the payment was not *ipso facto* void on the ground that the trustee could receive payment only in legal currency. This principle discharges the debtor in all such cases. But whether the trustee shall be exempt from responsibility is another question, which will depend in each case on its own special facts, such as good faith, reasonable and

---

April Term, 1882.

---

proper diligence and care, and the terms of the trust under which he acts.

In view of these authorities coming from the court of last resort in this State, it is needless to inquire elsewhere. In any event, these must control us, running, as they do, in the same direction in an unbroken current, on the exact point involved here, from the close of the war, when these perplexing questions first arose, up to the present time. The case of *McDuffie v. McIntyre*, 11 S. C. 551, is not in conflict. That case decided that a guardian had no power to sell a bond and mortgage belonging to the estate of the ward. That such property occupied the same position that any other property of the ward would, such as a horse, a watch, goods and chattels of any kind, or real estate. Of such property belonging to the estate of his ward, the guardian has no such legal title as would authorize him to dispose of it, without the order of the court. But there is a clear distinction between such a case and that of an executor or administrator who is authorized to sell the property of the estate and take notes therefor to themselves.

The cases from the Supreme Court of the United States, relied on by appellant, had other features, different from the above cases, which prevent conflict. In *Fretz v. Stover*, 22 Wall. 198, the bonds in no sense belonged to the party who collected them. He was simply an attorney in possession for collection, and the case turned upon the question, whether he had exceeded his powers in the manner of the collection. Not being the legal owner, he had no right to exceed his agency, and the court held the parties, who paid him in other currency than such as his agency authorized him to receive, responsible over to the principal who repudiated the unauthorized settlement. That principle does not touch the one here. Here, the executor was the legal owner, had full power at his peril to deal with the bonds in question as he chose, to exchange, release, or compromise, which being done without fraud and free from imposition, surprise, or undue advantage, would be final, and could not be opened to the prejudice of the debtor.

In *Horn v. Lockhart*, 17 Wall. 571, an executor in the State of Alabama was held responsible for funds of the estate invested

---

Syllabus.

---

by him in bonds of the confederate government. This was upon the ground, that inasmuch as these bonds were issued for the avowed purpose of raising funds to prosecute the war, the investment was an act giving aid and comfort to the enemies of the United States, and, therefore, void. The question of the liability of the debtors to the estate, who had paid off their indebtedness, was not involved, and not passed upon.

We see nothing in *Williams v. Buffy*, 96 U. S. 177, or in *Ketchum v. Buckley*, 99 U. S. 188, which touches the question raised here. It is said in *Williams v. Buffy*, by Mr. Justice Field, that "debts can only be satisfied when paid to creditors to whom they are due, or to others by direction of lawful authority." This is not controverted, on the contrary is recognized as familiar law, but it is equally good and familiar law that when creditors to whom a debt is due extinguish the debt by the receipt of that which they have consented to receive as payment—whether it be money or any other commodity—there is no authority in the courts, or any other power, to revitalize it. It becomes an executed contract and passes out of existence. We think that Robertson occupied the position of a creditor. Ball was his debtor, and Ball having paid to Robertson the amount due him in such currency as Robertson was willing to receive, the payment being *bona fide* and free from fraud and collusion, the matter then reached a finality beyond resuscitation by this court or any other legal authority.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

---

CHAPMAN v. LIPSCOMB.

1. Exceptions to a decree are required by the fifth rule of this court to state specifically the errors alleged; an allegation of error by mere reference to exceptions sustained or overruled by the Circuit judge, is insufficient.
2. Where a master's report fails to state its conclusions of law and fact separately, the proper remedy is a motion to recommit; it furnishes no ground for an exception.

---

April Term, 1882.

---

3. Where an action at law, as, *e. g.*, for the recovery of personal property and damages for its detention, is referred by consent to a master to determine all the issues, whose findings of fact are adopted by the Circuit judge, this court has no power to review such findings.
4. Nor it is otherwise where the answer sets up an equitable defense, for the complaint determines the character of the action. In such case the legal and equitable issues must be tried, each by their appropriate tribunal; but here the exceptions as to findings of fact relate only to the legal issues, and cannot therefore be considered.
5. The code of procedure has abolished the difference in forms of action as they heretofore existed in the two jurisdictions, but has made no change as to causes of action, or in the marked distinction which formerly existed between law and equity.
6. The true test of a partnership is the existence of a communion of profits and losses.
7. A contract whereby one party is to furnish a certain number of laborers to work in a brickyard, and to receive therefor one-half of the bricks made and to have the option of purchasing a fixed number at a stated price, the other party to make the brick and defray all other expenses, does not constitute a partnership.
8. And the party making the brick could sell to a stranger his half of the brick on hand, and the purchaser would be entitled to the possession of the property purchased, without regard to his vendor's indebtedness under the contract.
9. Exceptions taken at the reference to the admission of incompetent testimony by the master, not considered, it not appearing that the Circuit judge made any ruling upon them, and no exceptions upon these points having been taken to the Circuit decree.\*

Before COTHRAN, J., Richland, November, 1881.

---

\* The brief does show that this testimony was objected to by defendant when offered, and that exceptions were duly taken to the master's ruling admitting it. We do not, however, understand this court to have overlooked those exceptions, or to hold that any further exception was necessary to bring this matter before the Circuit Court; but that an exception to the ruling or decree of the Circuit judge, upon this testimony, was necessary to bring before this court any error committed by him in overruling the exceptions noted by the master in his transcript of the testimony. It will be observed that the chief justice is confining himself to the exceptions taken to the Circuit decree, the first of which refers back to the exceptions taken to the master's report, and as the exceptions to the admission of this testimony are not to be found in the exceptions taken to the master's report, nor alluded to in the other exceptions to the Circuit decree, the question, although properly before the Circuit Court for determination, if there urged, was not raised by any of the exceptions upon which the appeal to this court was based.—REPORTER.



---

Statement of the Case.

---

This was an action by W. W. Chapman against T. J. Lipscomb, superintendent of the South Carolina penitentiary, commenced in August, 1879. The nature of the action and the pleadings are stated in the opinion of this court.

By consent of counsel, the cause was "referred to N. B. Barnwell, Esq., master for Richland county, to take testimony and determine all issues of fact and law in the above stated cause, and that he report his actings and doings in said cause with all convenient speed to this court." The master reported as follows:

This cause arises upon the following facts: On August 4th, 1879, one J. A. Bondurant sold and delivered to the plaintiff, for a valuable consideration (to wit, the right to manufacture and sell in certain counties in Georgia a certain article, known as a "cotton planter," the patent right to which was owned by the said plaintiff), the articles mentioned in the complaint, the said articles being then in the custody and control of the said J. A. Bondurant, who was, at that time, engaged in the manufacture of brick, upon a brickyard held by the defendant, under a lease from the Columbia Water Power Company, the said defendant having entered into a contract with the said J. A. Bondurant and one J. P. Bondurant, the father of the said J. A. Bondurant, the terms of which are set out in the answer in this case.

Being satisfied that this was a *bona fide* sale for value by the said J. A. Bondurant, acting for himself and the said J. P. Bondurant, to the said plaintiff, and there being no satisfactory proof before me of any fraud and collusion between the parties, it only remains to inquire whether, under the terms of the contract, the said J. A. & J. P. Bondurant had such right and title in the property sold as to enable them to give a good title to the plaintiff, without the knowledge and consent of the defendant thereto, it being admitted that the defendant knew nothing of the transaction between the plaintiff and the said J. A. Bondurant.

It is claimed by the defendant, that under the terms of the contract between himself and J. A. & J. P. Bondurant, that he, the defendant, became a partner with the said J. A. & J. P. Bondurant in the manufacture of the said brick, and that, until a division of the brick, the same remained partnership assets,

---

April Term, 1882.

---

and that the plaintiff, being fully informed, as it is admitted he was, of the terms of the contract, could acquire no right to the property until there had been an accounting between the defendant and the said J. A. & J. P. Bondurant. Under this view of the case on the part of the defendant, the defendant at first refused to give up any part of the property purchased by the plaintiff; subsequently, and after suit brought, the defendant permitted the plaintiff to take all of the articles except the 171,000 brick, being the one-half of a kiln of brick of 342,000 brick then upon the premises, the said brick having been made under the contract hereinbefore referred to. All the brick the defendant has taken possession of, and made such use of them as he thought proper, to wit, has used the whole kiln for the purposes of the South Carolina penitentiary.

Even if, under the terms of the contract, it could be held that a partnership existed, I am satisfied that the said J. A. & J. P. Bondurant had full authority and power to sell the one-half of the said kiln, without the knowledge or consent of the said defendant, to such person and for such price as seemed best to themselves. I am the more confirmed that this is the correct interpretation to be given to this contract, from the fact that this seems to have been the view held by the parties themselves in executing this contract, to be inferred from the fact that the said J. A. Bondurant did sell in such manner as he saw fit, without consultation with the said defendant, a large quantity of brick, to wit, more than 100,000, to such persons and at such prices as seemed proper to the said J. A. Bondurant, all of which was well known to the defendant, who only seemed to have taken notice of these sales to the extent of cautioning the said J. A. Bondurant against failing to be able to furnish the penitentiary with the amount of brick expected. But I am satisfied that the terms of this contract constituted no partnership between the parties, and that the remedy of the defendant is not against the property in dispute in any way whatever, but must be upon the contract against the parties thereto. Under this view, the right of the plaintiff to this property, without let or hindrance, accrued absolutely on August 4th, 1879, and it was the duty of

---

Statement of the Case.

---

the defendant to have peaceably permitted him to take possession thereof.

The value of the brick I find to be \$6 per thousand. The damages sustained by the plaintiff I assess at \$250.

I find, as a conclusion of law, that the plaintiff is entitled to the possession of the property sued for, and if the same be not delivered, for the value thereof, to wit, the sum of \$1,026, and for the sum of \$250, his damages, and for the costs of this action.

All of which is respectfully submitted.

(Signed,)

NATHANIEL B. BARNWELL,

March 31st, 1880.

*Master.*

The following was the contract between the defendant and the Bondurants:

THE STATE OF SOUTH CAROLINA, county of Richland—This indenture in duplicate, had, made and agreed upon, this 13th day of February, 1879, by and between T. J. Lipscomb, superintendent of the South Carolina penitentiary, of the first part, and J. A. & J. P. Bondurant, of Augusta, Ga., of the second part, witnesseth:

*First.* That the party of the first part, in consideration of the payment to him of a certain proportional share of bricks hereinafter stipulated to be paid, and of the covenants hereinafter entered into by the party of the second part, doth hereby agree to furnish to said party of the second part fifty able-bodied convicts, for the term of seven months, daily, (Sundays excepted,) or their labor for 9,100 days in the aggregate in each year. The labor of said convicts to be used for the purpose of brick making on the Kinsler (or Green) brickyard tract, in Richland county.

*Second.* Said convicts, and a sufficient guard to guard them, to be furnished free of cost to said party of the second part. The feeding and clothing of said convicts, and the whole cost of maintaining the guard, to be defrayed by the party of the first part.

*Third.* The said party of the first part also agrees to assume the payment to the owner of the yard of the royalty of 100 bricks for every thousand bricks made.

*Fourth.* That the party of the second part agree to make three million (3,000,000) of bricks in each and every year during the terms of this contract, using only 9,100 days' labor of convicts in each year, and to turn over to the party of the first part at the brickyard, one-half of all the bricks made. Said bricks to be of average quality of the bricks burned in each kiln.

---

April Term, 1882.

---

*Fifth.* That the said party of the second part agrees to sell to said party of the first part 1,000,000 of bricks in the year 1879, if he needs them for the use of the South Carolina penitentiary, at the rate of five dollars (\$5) per thousand on the yard, or six dollars (\$6) per thousand delivered at the penitentiary.

*Sixth.* That the said party of the second part agrees to assume all other expenses consequent upon the manufacture of the brick, except the convict labor, guard, and royalty to the owner of the yard.

Witness our hands and seals, this 13th day of February, 1879. This contract to exist for two (2) years, with the privilege of five (5) years.

T. J. LIPSCOMB, [L. s.]  
JOHN P. BONDURANT, [L. s.]  
JAMES A. BONDURANT, [L. s.]

To the master's report, defendant excepted as follows:

1. That the master has not reported the testimony in the cause. 2. That his report does not contain a statement of the facts found and the conclusions of law separately. 3. To statement in pages 2 and 3 of copy furnished. 4. To findings. That this was a *bona fide* sale for value. 5. That there was no satisfactory proof of fraud and collusion between Bondurants and plaintiff. 6. That the Bondurants had full power and authority to sell one-half of the brick kiln mentioned, without knowledge or consent of the defendant. 7. To the reasons given for the preceding finding. 8. That the terms of the contract between the Bondurants and defendant constituted no partnership. 9. That defendant's only remedy is against the Bondurants only. 10. That plaintiff's right to this property, without let or hindrance, accrued absolutely on August 4th, 1879, and it was the duty of defendant to have peaceably permitted him to take possession thereof. 11. To the value of the brick found. 12. To the damages sustained by plaintiff found. 13. To the final conclusions.

The Circuit decree was as follows:

This was an action heard by the court at the fall term of the Court of Common Pleas for Richland county, November, 1881, upon exceptions to the master's report, the cause

## Circuit Decree.

having been referred to him "to take the testimony and determine all issues of fact and law" therein. It appeared upon the trial before me that an appeal had been taken from the refusal of a former Circuit judge, to hear the cause upon the ground of want of jurisdiction of the master, to hear the matter upon reference, the defendant insisting that the provisions of the code, embraced in sections 294, 295, 296, 297 and 436, apply only to referees, and not to masters in those counties of the State where such had been appointed, and the office of referees abolished. The Supreme Court, by McIver, A. J., say in this case: "We are, therefore, unable to concur in the conclusion reached by the Circuit judge, that the master has no jurisdiction to hear this case; and, on the contrary, think that the parties were entitled to have the case heard upon the master's report and exceptions." And the judgment of the court was made in accordance therewith. 15 S. C. 470.

The master's report, which embraces a vast amount of testimony taken by him, as well as other testimony taken by commission, has been carefully considered; and, although there is much conflict between the parties and the witnesses for plaintiff and defendant, and some circumstances connected with the conduct of the plaintiff and J. A. Bondurant, especially of a character somewhat suspicious, I fail to find in these such proof of fraud as to overcome the presumption of integrity, which the law throws over and around the transactions of men in the ordinary affairs of business.

Concurring, as I do, in the conclusions reached and announced by the intelligent master who heard this cause, I can the more freely criticise the inartificial manner in which he has blended in the report his conclusions of fact and law. It would have been better to have separated these more distinctly than he has done. He finds, however, as matter of fact (1) that the transaction impeached by the defendant was *bona fide*; (2) that there was no partnership between the Bondurants and the defendant, as the representative of the penitentiary authorities (this latter I take to be a mixed question of law and fact); and, as further matter of fact, the value of the bricks sued for, and the damages sustained by the plaintiff; and, as a sole conclusion of law, the

---

April Term, 1882.

---

plaintiff's right to recover the possession of the property sued for, to wit, \$1,026, and his damages, the sum of \$250, and the costs of this action. In all of these I concur.

Wherefore it is ordered, adjudged and decreed, that the exceptions to the master's report be, and the same are hereby, overruled, and that said report be confirmed and made the judgment of this court.

From this decree defendant appealed on the following exceptions:

1. On all the grounds which were exceptions to the master's report. 2. Because his Honor ordered those exceptions to be overruled, and confirmed said report, and made it the judgment of the Circuit Court. 3. On all the grounds on which the Circuit judge bases his conclusion, which are incorporated with those exceptions. 4. Because the proof shows, conclusively, fraud on the part of plaintiff and his associates.

*Messrs. Bachman & Youmans*, for appellant.

*Messrs. Rion, Lyles & Barron*, contra.

October 28th, 1882. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. This case was heard below upon a report of the master, with the testimony upon which the report was founded. The action was an ordinary action for the recovery of personal property, or for the sum of \$1,000, the alleged value thereof, in case a delivery could not be had, and for damages.

The property consisted of 179,000 bricks, more or less, alleged by the plaintiff to have been in his possession and wrongfully taken by the defendant. The defendant relied mainly upon a contract between himself and certain parties who had made the bricks, to wit, J. A. & J. P. Bondurant, under which the bricks had been made, alleging that these parties had failed to carry out this contract, and that by their consent he had taken possession of the bricks as of right under said agreement, and that no sale or assignment of said bricks, by these parties to the plaintiff, could bind him, except so far as there might be a surplus after a full accounting between the said J. A. & J. P.

---

Opinion of the Court.

---

Bondurant and himself; and he demanded an accounting. There was no averment of fraud in the answer as to the sale. The contract referred to will be found in the report of the case. [Here follows a statement of the master's report, the Circuit decree and the exceptions.]

This appeal was taken before the recent rule of this court, on the subject of exceptions presented in the general form of the first exception, to wit, simply by reference to exceptions taken elsewhere than to the decree or judgment itself. It is our duty, therefore, to look back to the master's report, and to take up the exceptions thereto and consider them *seriatim*. The first was disposed of by a subsequent order of the Circuit judge requiring a report of the testimony to be made, which was done, and the report filed. If that report was not satisfactory, there should have been a motion to recommit. This fact shows the confusion which may result from exceptions taken in this general and informal way, and vindicates the rule recently adopted, which rule the court hopes will not escape the notice of the profession in their preparation of appeals in the future.

The second exception is met by the cases of *Bollman v. Bollman*, 6 S. C. 44, and *State, ex rel. Cathcart, v. Columbia*, 12 S. C. 393. In the first case, it was said on this subject: "It may be enough to say that the language of the code is to be considered as directory and not mandatory." Again, "In addition to what has been said, if the separation was necessary to a better understanding of her rights, her course was not to except because of the omission, but to move for a recommittal of the report, that it might be re-produced in the desired form." In the second case, the principle was announced as follows: "The first exception has been previously disposed of by this court, holding that the neglect of the referee or Circuit judge to present distinct findings of fact and conclusions of law is not error." The court say further: "It is to be regretted that so little regard is paid to this salutary requirement; but the remedy is not by appeal to this court on the ground of error of judgment; what might be the effect of a motion refused to correct such irregularity as a foundation of an appeal, we are not called upon to say, as that is not the present case."

---

April Term, 1882.

---

The third exception questions "statements in pages 2 and 3 of copy furnished." We have no means of ascertaining the precise questions raised by this exception, and, therefore, pass it over.

The remaining exceptions question certain findings of the master, and which were adopted by the Circuit judge. These findings consist both of fact and of law. The findings of fact being, first, that a *bona fide* sale for value had been made of the bricks by the Bondurants to the plaintiff; second, that there was no fraud and collusion between Bondurants and the plaintiff; third, as to the value of the bricks, and, fourth, as to the damages found. The findings of law were, first, that the terms of the contract constituted no partnership between the Bondurants and the defendant; second, that the Bondurants had full power and authority to sell one-half of the brick kiln mentioned, without the knowledge or consent of the defendant; third, that defendant's remedy is against the Bondurants only.

As to the findings of fact, these cannot be reviewed by this court, however erroneous they might be. This court, as we have often had occasion to say, is for the correction of errors of law in cases at law, with appellate power only in cases of Chancery. In a law case, the facts are beyond our reach. The constitution gives them to the jury exclusively, except that the errors of the jury in this respect may be reviewed and overruled by the Circuit judge on motion for a new trial, and may, in an extreme case, reach this court on appeal from the action of the Circuit judge on such motion, where it involves an error of law. It is only in Chancery cases that we can review the facts, which must be brought here in such cases either by a "Case" made up for that purpose, or on a case with exceptions, which latter brings up both errors of fact and of law.

Now, to apply these principles, the question arises, is this a law case, or a case in Chancery? Whether it is the one or the other does not depend upon the form or mode of trial which the parties may have adopted. A law case, it is true, is usually tried by a jury, but the right to a jury may be waived, and the facts submitted to a master or referee, or to the court if the parties so consent, but the case is nevertheless a law case, and must



---

Opinion of the Court.

---

be governed by the principles applicable to cases at law. A case in Chancery is not different, under the code, from cases of that character before the code. The code has made no change as to causes of action, or as to the marked distinction which formerly existed between equity and law. These still exist, and the code leaving these untouched has dealt simply with the forms of action, having abolished all previous forms and prescribed one and the same for all classes of injuries or causes of action.

The cause of action in the present case was the withholding by the defendant of the personal property of the plaintiff, and the plaintiff desired to recover his property with damages for its detention. His form of action before the code would have been trover, which is an action at law. His action is still of the same kind and on the law side of the court involving no principles of equity whatever. Such being the character of the case, the facts involved, whether found by a master, referee or the court, are beyond the jurisdiction of this court, and, in considering the legal questions involved, these facts must be taken as they have been found below.

It may be said, however, that the answer set up an equitable defense, and converted the case into a case in Chancery. A defendant cannot change the character of the plaintiff's action by simply interposing an equitable defense. If this could be done, it would give power to the defendant to deprive the plaintiff of the right of trial by jury at his pleasure, which would be placing that important constitutional right upon a very uncertain tenure. The former practice in such cases was for the defendant to go into the Court of Equity and enjoin the action at law, until the equitable defense could be heard. Now, the Court of Equity having been abolished, and the jurisdiction of that court having been conferred upon the Court of Common Pleas, equitable defenses, it is true, may be set up in that court, and be heard there with the legal action to which it is interposed as a defense, but the action and the defense are not consolidated into one and tried necessarily by the same tribunal; on the contrary, they still preserve their original and distinctive features, the one being still entitled to be tried by a jury and the other by the court under the forms of an equity proceeding.

---

April Term, 1882.

---

In *Adickes v. Lowry*, 12 S. C. 108, the court, in discussing the nature of equitable defenses interposed in an action at law, said: "Such defense is equitable in its nature, and belongs to that side of the court which exercises the Chancery jurisdiction. Under the former practice, such defense could not have been set up in the action at law to try the title and recover possession. The defendant would have been obliged to file his bill in equity to restrain proceedings at law, and to seek such other relief as in equity he might have a right to demand. Under the Code of Procedure, all this may be affected by the pleadings in a single action, and new parties, if necessary, brought in; but at the trial, the legal and equitable issues must be distinguished and decided by the court in the exercise of its distinct functions as a court of law and a court of equity, and only those should be determined by a jury which are properly triable by a jury, while those which would formerly have been properly triable in equity must be determined by the judge in the exercise of his Chancery power."

The case before the court was referred to the master by consent, "to take the testimony, and determine all issues, both of fact and law, and to report his actings and doings to the court." The master was thus charged with the whole case, complaint and defense, law and equity; and discharging his duty under this consent order, he was invested with the functions, both of the jury and a chancellor—of a jury as to the facts upon which the plaintiff rested his case, and of a chancellor as to equities of the defense. The facts on the law side were those to which the defendant has excepted. As to these, as we have already said above, they are not before us.

We come, then, to the questions of law. The first and most important arises upon the construction of the contract. Did that constitute the defendant a partner with the Bondurants? We think not. The true test of a copartnership is that there must be a communion of profits and losses. Story, in section 19 of his work on Partnership, says: "It is often laid down in elementary works, as well as in common authorities, that to constitute a partnership there must be a communion of profits and losses between the partners; and this, in a qualified sense, is

---

Opinion of the Court.

---

perfectly true, when it is understood with proper limitations belonging to the statement." And in section 21: "That each partner must, at all events, share in the losses, so far, at least, as they constitute a charge upon, and diminution or deduction from, the profits, and in this sense it is regularly true."

We see nothing in the contract which could subject the defendant to any losses which might overtake the business. Nor was he to have a certain portion of the products as profits. The benefit which he expected to derive was not dependant upon the successful operation of the business by the Bondurants, nor was it to await the payment of the expenses to be incurred. On the contrary, he was to have delivered to him by the Bondurants a fixed proportion of all the brick made on the yard, to wit, one-half—not one-half after the payment of debts and expenses incurred, but one-half of all made, the Bondurants agreeing also to sell to him 1,000,000 in the year 1879, at a certain rate. These stipulations were based upon the consideration that the defendant was to furnish a certain number of convicts as laborers in the yard. They are inconsistent with the idea of a copartnership, and we can see no error in the ruling of the court upon that subject.

Such being our conclusion upon the question of the partnership, it follows necessarily (the court below having found as matter of fact, that a *bona fide* sale had been made of the bricks in question by the Bondurants to the plaintiffs, and the sale free from fraud and collusion), that plaintiff's right to the property had been established, and he was entitled to a recovery. And the defendant's cause of action being for the breach of the contract on the part of the Bondurants, his remedy was against them only. The moment the court below construed the contract as constituting no partnership, the equitable feature in the defense vanished, and nothing was left but a plain and ordinary action at law for the recovery of personal property which depended solely upon the facts as developed in the testimony.

Some question is made in the argument of appellant as to incompetent testimony, but we find no exception among the thirteen taken to the report of the master, referring to this matter. Nor do we see that the judge made any ruling on this

---

April Term, 1882.

---

subject, or that any exception to the decree raises such a question.

As to the damages, we see nothing erroneous in the ruling of the Circuit judge on that subject. The complaint was for the recovery of the property and damages for its detention. What amount of damages the plaintiff sustained was a question of fact exclusively for the jury, or other tribunal acting as a jury, subject to be corrected, if erroneous, by other proceeding than by appeal.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

---

OLIVER v. WHITE.

1. The act of 1870 (14 Stat. 380), allowing an exemption of personal property to the head of a family, whether he owns a homestead or not, was not in conflict with the constitution of 1868.
2. *Quere.* Are type, press and printing material, tools within the meaning of that word as used in the homestead clause of the constitution?
3. An exemption cannot be claimed as against an execution for city taxes, even though no certificate that it was issued for such an obligation be endorsed on the process.
4. A sheriff is not liable in damages for levying on property exempted under the provisions of the constitution and the homestead acts. The claimant must demand the right given him by the constitution.

---

Before KERSHAW, J., Charleston, July, 1881.

This action was commenced April 28th, 1880, for damages for a levy on defendant's property under an execution issued by the city court of Charleston, in February, 1879. The complaint alleges that the execution was "issued out of the city court for a license, in 1878," and that the "said material had been laid off and assigned to plaintiff as a homestead, in 1877, in the suit of *McCull, Sullivan & Co.* against *W. J. Oliver.*" At the trial, according to the brief, "the plaintiff introduced the assignment of homestead in the last-mentioned case," and proved, by the

---

Statement of the Case.

---

deputy sheriff of Charleston county, that it was taken from the record of that case in his office. The terms of this assignment are not given. Other matters are stated in the opinion.

In granting the non-suit, the Circuit judge said :

This execution, exceedingly irregular on its face, is produced here by the plaintiff, who complains that certain property was levied on by the defendant, who was then the sheriff of the city of Charleston, and was charged by the terms of this execution with carrying it into effect by the seizure of the defendant's property. This property was seized by the defendant, and the plaintiff claims that it was exempt from the seizure by the terms of the homestead act and the laws passed in pursuance thereof by the legislature of the State.

It was generally conceded, until quite recently, that these acts of the legislature, although different from the constitution, were valid, and they were universally practised upon up to the time of the recent decision, which has been cited here. But those decisions have declared that the powers of the legislature did not extend so far as to deal with the matter of exempting property from levy and sale by execution, because the legislature had attempted to legislate upon that subject and had lost all legislative powers. They had no power to legislate beyond the declarations of the constitution. It is generally considered unfortunate that these views of constitutional law should prevail, denying to the legislature an exercise of power, from time to time, when not prohibited by the constitution from such legislative action.

It used to be considered that all the rights and privileges of legislation proper to legislative bodies, and not denied by the constitution, could be exercised by the legislature. But that is not the character of the instrument under which we are now living, and the Supreme Court has so construed the constitution, especially in regard to this matter, much against the will of the legislature of the State. However much it is to be regretted, I am bound by those decisions, and I suppose that the Supreme Court, which pronounced the decisions, regretted it as much as I do, that those who framed the constitution did not protect the man who owned a little personal property and no real estate. But they did not so provide. The last legislature passed an

---

April Term, 1882.

---

amendment to the constitution, which makes these humane provisions of law applicable to the poor landless man, as well as to those having large landed estates. But this has no reference to this case. It cannot be retroactive in its effects. The claim, therefore, that this property was exempt by the homestead is concluded by the decisions cited before the court.

It is hardly necessary for me to say anything about the construction of the word "tool," and if it rested on the Massachusetts case, I would, by no means, be governed by it.

Something has been said that this is a claim for taxes, and though it has assumed the form of an execution, yet I think that upon that ground the property would not be exempt from liability. I don't know that the homestead is exempt from taxation. The municipal power is only delegated power. Its taxation is State taxation, delegated by the State to the city administration. No abuse of the process has been shown. No action of the deceased sheriff, beyond that which the execution required him as a matter of duty to perform, is shown. The plaintiff is, therefore, without status in court. The non-suit is granted.

*Mr. W. M. Thomas*, for appellant.

*Mr. G. D. Bryan*, contra.

November 14th, 1883. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. Alonzo J. White was sheriff of Charleston, and as such officer was instructed to collect an execution of the city council of Charleston against W. J. Oliver, for \$119.75. In the discharge of this duty he levied upon certain printing material, type, &c., and closed up the printing office, known as the *Democrat* in the city, belonging to W. J. Oliver, the defendant in the execution. The office seems to have been closed for several weeks, and then the execution being paid by Mrs. Oliver, the levy was released and the property returned. This action was brought by the plaintiff, W. J. Oliver, against Alonzo J. White, the sheriff, for damages alleged to have been sustained by the suspension of his business as editor, caused by the levy aforesaid.

## Opinion of the Court.

The complaint alleged that the levy was illegal for the reason that, being the head of a family, he was entitled to homestead in the type and printing material, which, as "tools," were exempt by the constitution from levy and sale. The sheriff answered that he made the levy in the discharge of his official duty; that the property was restored as soon as the execution was paid, and that Oliver, the defendant, was not entitled to claim the type and printing press, as homestead. After he answered, but before trial, Alonzo J. White died, and Blake L. White administered upon his estate, and in some way the case was revived against him as administrator.

After the plaintiff closed his evidence, the defendant's attorney moved for a non-suit, which was granted by Judge Kershaw, who held that W. J. Oliver was not entitled to claim homestead in the printing material, for the reason that the constitution, as recently construed, did not allow homestead in personal property, except as an incident to homestead in land, and for the further reason that it appeared the execution was for taxes due the city of Charleston. He held that the deceased sheriff did nothing beyond what the execution required him to do as a matter of official duty. The plaintiff appeals to this court upon the grounds. 1. "Because the plaintiff was entitled to a homestead in the personalty levied upon, as being the head of a family. 2. Because the press and types were 'tools' of trade, in accordance with the constitutional exemption."

We do not clearly see how the original action against Alonzo J. White for a tort, alleged to have been committed by him, was revived against his administrator, Blake L. White, in view of the maxim "*quod actio personalis moritur cum persona.*" The code only provides for such continuance upon the death of the defendant "if the cause of action survive or continue;" but as there probably was some good reason for it, we will consider the case, which must be controlled by the law as it stood before the amendment of the constitution in 1880 in regard to homestead.

We do not understand that this court has ever declared unconstitutional the act of 1870, "to further determine and perpetuate the homestead." 14 Stat. 380. That act provided that "whenever the personal property of the head of any family is taken

---

April Term, 1882.

---

or attached by virtue of any mesne or final process issued from any court, and said person shall claim the said property, or any part thereof, as exempt from attachment by the provisions of section 32, Article II. of the constitution, whether the said person owns a homestead of real estate or not, it shall be the duty of the officer executing the said process to cause to be laid off and appraised, such property as the said person may select, consisting of such articles as are enumerated in the constitution, &c.

The precise question of the constitutionality of this act has never before arisen in this court; but other questions have been decided here connected with that act; indeed, based upon it, which, therefore, incidentally, at least, affirmed the validity of the act. The following cases have recognized the act. *Prince v. Nance*, 7 S. C. 351. In this case the plaintiff sued the defendant for rent in arrear, and attached part of his crop, cotton in the seed, &c. He moved to set aside the attachment on the ground that he was entitled to an exemption of one-third of his crop under the act of 1873, 15 Stat. 373. It did not appear that the defendant owned any land. The court held that, being the head of a family, he was not entitled to the exemption under the act, but was remitted to his right under the homestead provision of the constitution, which excluded the right as to rent, "an obligation contracted in the production of the crop." The court said: "The express object of section 9 of the act above mentioned is to secure exemption in the nature of a homestead of one-third of the yearly 'products or earnings' to every person not the head of a family, and not to persons who are heads of families, as they have the right to homestead exemption, in a proper case, by laying claim thereto as provided by law."

*Duncan v. Barnett*, 11 S. C. 333. This was a rule upon the sheriff because he had not sold under an execution certain personal property, viz., two bales of cotton, seed cotton and corn. The only question was whether the subsequent attempt to add to the list of articles exempted, "one-third of the annual product of agricultural laborers" by the act of 1873, was consistent with the provisions of the constitutional enactment. It was not whether the head of a family



---

Opinion of the Court.

---

without land was entitled to an exemption of personal property, but whether the particular articles fell within the category of those enumerated in the constitution. It did not appear that the defendant in the execution had or claimed any homestead in land, and yet it was assumed that if the articles levied had been such as are named in the constitution, there would have been no question about it.

*Pender v. Lancaster*, 14 S. C. 28. The question in this case was whether a person who married and became the head of a family after an execution against him had been levied on a horse, was entitled to claim the horse as exempted under the constitution, notwithstanding the previous levy. It did not appear that the defendant owned any land, and yet it was taken for granted that he was entitled to the exemption, unless he had lost the right by the levy before his marriage. In delivering the judgment of the court, Chief Justice Willard distinctly recognized the exemption of personal property as a matter entirely independent of homestead in land, for he said: "The right to the homestead, and that to the exemption of personal property of the prescribed kinds, must be regarded as of the same nature and attended by the same general incidents, as they are both created by the same instrument for the accomplishment of the same purpose, and only differ in the respect that one relates to real and the other to personal property."

We must, therefore, conclude that the Supreme Court has never declared unconstitutional the act of 1870, before referred to, but, on the contrary, at different times and in various ways has recognized it, and incidentally, at least, affirmed its legality and validity. It follows that when the levy was made upon the property of the defendant, Oliver, he was not excluded from claiming the exemption of his personal property, although he owned no land and had no homestead therein, provided the articles of property were such as are enumerated in the constitution.

Assuming that Oliver had the right to claim the constitutional exemption in personal property, although he owned no land, were the type, press and other printing material such personal property as fall within those enumerated in the constitution? The articles enumerated in the constitution are, "household fur-

---

April Term, 1882.

---

niture, beds and bedding, family library, arms, carts and wagons, farming implements, tools, neat cattle, work animals, swine, goats and sheep, not to exceed in value, in the aggregate, the sum of \$500." The press and type cannot possibly fall under any class named, except it may be that of "tools." Does that word naturally and properly embrace press, type and printing material? The word "tool" is defined to be "An instrument of manual operation, particularly such as are used by farmers and mechanics."

It seems to have been held, in Iowa, that it embraces printing press, type and other material, but that the contrary has been held in Massachusetts. *Buckingham v. Billings*, 13 Mass. 82; *Dunford v. Woodman*, 10 Pick. 426. It is not perfectly clear, but we are inclined to agree with Judge Wilde, who, in delivering the judgment in the last case cited, said: "The word 'tool' is not understood, either in its strict meaning or popular use, as designating complicated machinery, which, in order to produce any useful effect, must be worked by combining several distinct parts or separate pieces, the aid of more hands than one being necessary to perform the operation, all which is required in a printing apparatus. Nor can the several parts be denominated 'tools,' as they cannot be used separately, but, like the ax and its handle, must be united to accomplish any work. The press and forms may, with as much propriety, be denominated 'tools' as the types. All are the necessary component parts of the machinery for printing. Besides, types cannot be used as tools of trade by a printer, after he is stripped of the other parts of his printing apparatus, so that the exemption from attachment of the types alone would not enable him to pursue his trade and thereby gain his subsistence, which was the object of the statute."

But without regard to this question, the fact that the execution was for taxes was certainly enough to protect the sheriff. It is true, the certificate required by the act of 1868 was not endorsed on the process, but that requirement was for the purpose of simplifying the proof of the fact, and upon a question whether the execution was issued upon a claim for taxes, that

---

Syllabus.

---

omission would be evidence against the plaintiff in the execution, as in the case of *Agnew v. Adams*, 15 S. C. 36, cited in argument, but when once the fact appeared that the judgment was rendered upon a claim for taxes, we suppose that the plaintiff's omission to have the certificate endorsed by the court could not exclude the sheriff from the protection of the constitutional provision, which in itself has no such requirement.

Besides, the act itself seems to contemplate that the claim for homestead shall be made after levy. The words are, "whenever the personal property of the head of any family is taken or attached," &c. The sheriff is a ministerial officer, and has no right to consider and determine the question of homestead. The process in his hands is a mandate to make the money. If he sells or removes property, subject to homestead, he is liable to be indicted under the act "to punish sheriffs and other officers for violating the homestead" (14 Stat. 172); but it would seem that there is no prohibition against simply making a levy, which the sheriff being commanded to make, is the usual preliminary step to the claim of homestead upon the part of the defendant in execution. The constitution only gives the right to demand homestead, and it is necessary for the claimant to set it up and establish it as in regard to any other right. *Pender v. Lancaster*, *supra*.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

ABRAMS v. CARLISLE.

In an action for claim and delivery of a mule, the trial justice rendered judgment for plaintiff and notified counsel, and on same day issued his execution under which the constable at once seized the mule and delivered it to plaintiff; defendant on same day demanded of the trial justice a return of the property, and within five days afterwards moved for a new trial, which was granted. Afterwards this defendant sued the trial justice for damages. *Held*—

1. That the process having been executed and a new trial granted, the trial justice had no authority to undo what the constable had done.

April Term, 1882.

2. Has a trial justice the right to have his execution executed within the five days allowed for appeal or motion for new trial?
3. In issuing his execution the trial justice acted judicially, and is not, therefore, liable in damages, unless it was done willfully or corruptly. *McCall v. Cohen*, 16 S. C. 445.

Before HUDSON, J., Newberry, February, 1881.

The opinion states the case.

*Messrs. Moorman & Simkins*, for appellant.

*Messrs. Jones & Jones*, contra.

November 14th, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. Milton A. Carlisle is a trial justice of Newberry county, and this was an action against him for damages for acting contrary to law, and for official misconduct under the following circumstances: One David Boozer, in February, 1879, brought an action against Wilson G. Abrams for claim and delivery of a mule of the value of \$75. This action was brought before Milton A. Carlisle, as trial justice. Boozer gave bond, had the mule delivered to him, but on the same day Abrams, the defendant, gave the bond required in such case, and the mule was returned to him. On March 6th, 1879, the trial justice heard the case and delivered a judgment in writing for Boozer, that the mule be delivered to him, or in case a delivery could not be made, then for \$75 damages. March 8th this judgment was read to the counsel on both sides, and no motion was made for a new trial or notice given of appeal. On the same day an execution was issued to enforce the judgment, which was executed, and the mule delivered to Boozer. Soon after the delivery of the mule, and on the same day the attorney of Abrams demanded from the trial justice possession of the mule, and he refused to deliver the mule, saying the judgment had been executed. On March 12th Abrams moved for a new trial, which the trial justice granted, and the case was tried again on July 4th, and judgment again given for Boozer. July 11th

---

Opinion of the Court.

---

Abrams appealed to the Circuit Court of the Common Pleas, where the case is still pending. On August 7th Abrams again demanded that the trial justice should deliver the mule to him, upon the ground that he had given bond for the delivery of the mule if the final decision should be against him, but that pending the litigation he was entitled to retain possession. The trial justice refused to comply with the demand, and this action was brought against him for damages in acting contrary to law, and for official misconduct.

The presiding judge charged the jury "that if the trial justice acted within the scope of his jurisdiction and authority, and had issued no illegal execution, or did any illegal act, he was not liable; that in the absence of instructions from the plaintiff he was not bound to wait until five days elapsed before issuing execution at once; the judgment was announced to the attorneys on March 8th, and no intimation of an intention to appeal being given, he issued the execution and the same was enforced; no proceedings by the defendant Abrams, subsequent to this can operate as a *supersedeas* of the judgment and enforced execution; that no trespass was therefore committed by the trial justice in issuing the execution or in refusing to undo what the constable had done in enforcing the same; consequently the question of damages cannot go to the jury, and you must find for the defendant Carlisle."

The jury found for the defendant, and the plaintiff appeals to this court upon the following grounds: "Because the judge erred in charging the jury—1. That in the absence of instructions from the plaintiff in the judgment, it was the right and duty of Trial Justice Carlisle to execute the judgment he had rendered against the defendant, the plaintiff in this case, immediately upon its publication, and was not bound to wait until the time for appeal or motion for a new trial had expired. 2. That the proceedings in that case, subsequent to said judgment, did not operate as a *supersedeas* of the judgment and execution. 3. That the defendant, as trial justice, committed no trespass in issuing the execution and in refusing to undo what the constable had done in enforcing the same, and that the jury must find for the defendant."

April Term, 1882.

It is clear that the trial justice could not have legally delivered the mule to the plaintiff, Boozer, after the new trial was granted, for, in that case, the judgment would have been set aside, and the issue would have stood untried, precisely as it did when Abrams got possession of the mule under his bond. We take it to be also clear that, having had the mule delivered under his judgment before the motion for a new trial was made, the trial justice had no legal authority under a judgment which was then *functus officio*, to undo what the constable had done; so that upon this part of the case, the matter is reduced to the question, whether the trial justice was authorized by law to issue his execution on the very day his judgment was promulgated, and have it executed by taking the property from one and giving it to the other litigant, before the five days had expired, which are allowed for appeal or motion for a new trial.

We have no doubt that the trial justice, during that time, had the right to enter his judgment and lodge his execution, as it is sometimes said, "to bind property;" but this case does not make it necessary to decide whether he had the right, in an action for personal property, to have his judgment executed by seizing and delivering the property before the time allowed for appeal or motion for a new trial had expired. Under ordinary circumstances, we think it the better course for him to regard the case as still pending until the time allowed for a new trial or appeal has expired.

But Milton A. Carlisle was a judicial officer, and the subject-matter was clearly within his jurisdiction. He had just decided the case, and when he entered his judgment and execution to enforce it, he was acting judicially, as much so as when he rendered the judgment itself, and even if he did make a mistake in having the mule delivered at once, without reference to the right of the defendant to move for a new trial or appeal within five days, he was not liable in damages for the consequences, unless he acted willfully and corruptly. A judicial officer is not liable in damages for an honest mistake committed in the course of his duty. This court has lately had occasion to consider this question in the case of *McCall v. Cohen*, 16 S. C. 448, and it cannot be necessary to do more than refer to that case, in which

---

Syllabus.

---

the court say: "It is as well settled as any legal proposition can be, that a judicial officer is not liable in damages for an injury which may come to a party by reason of an error of judgment committed in the discharge of his duty, when the subject-matter is within his jurisdiction. Without going into the long line of authorities in support of this proposition, extending back, at least, to the time of Lord Coke, it cannot be necessary to do more than refer to the case of *Bradley v. Fisher*, 13 Wall. 335, decided in the Supreme Court of the United States as late as 1871, in which the subject received exhaustive consideration. \* \* \* This is undoubtedly the law in reference to courts having general authority, and it is equally true in reference to judges of inferior courts, except, possibly, as to the right to call in question the motives with which they act, whether ignorantly or willfully and corruptly." *Reid v. Hood and Burdine*, 2 N. & McC. 168; see also *Young v. Herbert* (in note to this case), and authorities.

There is no allegation here that the trial justice, Carlisle, acted willfully and corruptly. "Neither in the pleadings nor in the argument is he charged with collusion, fraud, malice or corruption. On the contrary, this is disavowed by plaintiff's counsel, who speaks in terms of praise of the ability and integrity of that officer."

The judgment of this court is that the judgment of the Circuit Court be affirmed, and the appeal dismissed.

---

STATE, EX REL. CONANT v. FULLER.

1. A writ of *mandamus* can only issue where there is a specific legal right to be enforced or a positive duty to be performed, and where there is no other specific remedy; and this legal right embraces not only the character of the claim, but also the form in which it is presented.
2. This highest of judicial writs will not issue to compel a county treasurer to pay an auditor's checks for assessment expenses, where the accounts for which the checks were issued have not been examined and approved by the county commissioners, as required by the act of 1875, § 23, (15 Stat. 993,) and subsequent legislation.

---

April Term, 1882.

---

Before KERSHAW, J., Beaufort, November, 1881.

This is an appeal from the following order of the Circuit judge. Other facts are stated in the opinion.

The claim of the relator is founded upon services rendered by assistant assessors in making the assessment for taxes in the year 1876, for which the relator holds the checks of the auditor on the treasurer of Beaufort county, as provided for in section 84 of the act of 1874, p. 762.

By that act, \$1,000 were set apart to pay the expenses of the assessment, which was required to be paid out of the first money collected for the year for which such assessment was made. In this instance the funds collected were paid out without providing for these claims. Here, lately, other funds have come into the hands of the treasurer on account of the taxes of that fiscal year. And the object of this proceeding is to procure a writ of *mandamus* to compel the application of this fund to the claims of the relator, which were not paid as they should have been out of the money formerly collected. If they had been so paid there would have been a different set of claims displaced, which would have remained unpaid, but which have been satisfied out of money applicable first to the claims of the relator. There therefore does not appear any reason to doubt the equity of the present claims, and they ought to be paid unless there be objections of a legal character preventing the relief demanded.

If the funds now in the hands of the treasurer had been paid out at the time when the other taxes for that year were collected and before any payments had been made from the entire fund so collected, there can be no question that the fund would have been charged with the payment of claims like this. And it would have made no difference whether they were paid out of the money first collected or the last. In other words, there was no specific appropriation of the identical \$1,000 first collected, so as to give the assessor the right to those specific dollars, and only to those, so that when these had been improperly paid out to the other parties the assessor had no right to be paid out of other funds left in the treasury. I do not think that the lateness of the time at which this fund has come into the treasury



---

Opinion of the Court.

---

can affect the rights of the relator. The taxes collected on account of that year, (1876,) whenever received, constitutes a fund applicable to those claims, which, under the act, constitute a class of claims preferred to the extent of \$1,000, payable out of that fund.

This special preference was necessary in order to procure an assessment to be made, without which there could have been no taxes collected. They are necessary expenses of administration, without which, the laws would be inoperative upon which the maintenance of the government depends. I do not think, therefore, that they come under the general class of liabilities of the county, to be thrown into the category of past indebtedness. The legislature very distinctly indicated this by the peculiar provisions of the act of 1874, placing them upon an entirely different and peculiar footing. I have given consideration to the various objections urged at the bar and in the return of the respondent, and find nothing to justify a refusal of the relief desired by the relator. The act providing for a division of the counties of Beaufort and Hampton, and a division of the debt between them cannot affect this question, nor can any confusion result in consequence, since reference was required to be had in such division to the unpaid taxes due Beaufort county.

It is ordered and adjudged that a writ of *mandamus* do issue to command the treasurer of Beaufort county to pay the claims of the relator as demanded, but without costs.

*Messrs. Elliott & Fowles*, for appellant.

*Messrs. W. J. Verdier, J. D. Pope*, contra.

November 15th, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. On November 15th, 1881, John Conant, the relator, applied to Judge Kershaw for a writ of *mandamus* to compel R. B. Fuller, treasurer of Beaufort county, to pay him the amount of twelve warrants, aggregating \$995. The affidavit of the relator set forth that at certain stated times in the years 1876 and 1877, L. S. Langley, then the auditor of

---

April Term, 1882.

---

Beaufort county, "drew his warrants or checks as such auditor, and directed them to the treasurer of said county according to law, and required him to pay to the persons named in said warrants or checks the amounts therein named, being in payment of the expenses of the assessment of said county for taxation for the fiscal year 1876, and to charge the sum to the assessment fund;" that thereafter said warrants or checks came to the hands of the relator, who is the lawful owner and holder thereof; that they were not paid by the then county treasurer, George Holmes, because there were then no funds in his hands applicable thereto; that respondent has funds in his hands applicable to the payment thereof and refuses to pay the same, although requested so to do, and that the whole expense of making the assessment for said year (1876) is still due and unpaid. The checks, twelve in number, were drawn for various sums from \$25 to \$200, and, with one exception, were in favor of "bearer" or "J. W. Brown or bearer." Eleven were dated on various days in June, July and August, 1876, and the twelfth on January 16th, 1877.

The respondent made return, in which he admits that he has in his hands county funds for the fiscal year commencing November 1st, 1876, collected lately, in May and July, 1881, amounting to the sum of \$882.86, but submits that the same is not applicable to the payment of relator's claims for various reasons therein set forth.

Judge Kershaw heard the case upon petition and answer, and granted the writ, we suppose, to the extent of the money in hand for the year commencing November 1st, 1876. The respondent appeals to this court upon the following grounds:

1. "Because his Honor granted the order upon equitable grounds, whereas it is submitted it should have been granted only to compel the performance of a clear duty, made obligatory by law upon the respondent.

2. "Because his Honor ruled that relator's claims had not become past indebtedness, and that the taxes collected for the year 1876, whenever received constituted a fund for the payment of such claims.

3. "Because his Honor ruled that the act creating the county of Hampton, and providing for a division of the debt of the

---

Opinion of the Court.

---

old county of Beaufort, between the present county of Beaufort and the county of Hampton, and the action of the commissioners appointed thereunder do not affect this question.

4. "Because the relator did not present said claims for payment at the time when the first collection of taxes, for said fiscal year were made by the then county treasurer, which said collection as claimed by him was applicable to the payment thereof.

5. "Because said claims, if valid, were payable from the proceeds of a tax levied by an act of the general assembly, approved March 22d, 1878, to be applied to the indebtedness of the county of Beaufort, for the fiscal year commencing November 1st, 1876.

6. "Because, under existing laws, respondent cannot legally pay said claims, except upon the checks of the county commissioners.

7. "Because said checks were not drawn in the manner then required by law, especially in this, that the alleged services for which they were drawn were not specified, nor were they ever audited or approved by the county commissioners.

8. "Because it is alleged in the return of the respondent, and not controverted, that said services were never rendered.

9. "Because no legal demand was made upon respondent for payment of said claim.

10. "Because respondent is not treasurer of the old county of Beaufort, but of the new county of Beaufort, and cannot therefore legally pay said claims."

The view which the court takes of this case renders it unnecessary to consider all the exceptions *seriatim*. It is well settled that the writ of *mandamus* can only issue to compel the performance of some act obligatory by law on the officer to whom it goes. He must have the ability to comply, and must be also under a clear duty in respect thereof. A writ of *mandamus* is the highest judicial writ known to the constitution and laws, and only issues when there is a specific legal right to be enforced, or where there is a positive duty to be performed, and where there is no other specific remedy. When the legal right is doubtful, or when the performance of the duty rests in discre-

---

April Term, 1882.

---

tion, or where there is other adequate remedy, the writ cannot rightfully issue. *Hayne v. Hood*, 1 S. C. 23; *Ex parte Mackey*, 15 S. C. 323.

Did the relator have a legal right, clear and beyond doubt, so that it was the plain ministerial duty of the treasurer to pay these checks? As we understand it, the legal right referred to embraces, not only the character of the claim, but also the form in which it is presented, and this must be determined by the state of the law and facts existing at the time the proceeding was taken. The county treasurer is a public officer, and he cannot be compelled by *mandamus* to pay any claim unless it is presented in the form required by law. The demands presented to him for payment in this case were simply checks of the auditor of Beaufort county for the time being, without having been investigated by the county commissioners, or having any statement attached showing the services alleged to have been performed by the parties, in whose favor they were drawn, and the question is whether it was the plain ministerial duty of the treasurer to pay them in that form.

It is alleged that the checks were given for services rendered in assessing the property of Beaufort county, in the months of June, July and August, 1876, preparatory to the levy of taxes for the fiscal year commencing November 1st, 1876, and are chargeable upon, and should be paid out of any money in hands from that levy. The respondent denies that the services were ever rendered at all, and refers to circumstances connected with the checks to sustain the allegation, and insists that he could not lawfully pay them without audit, and that the mere check of the auditor was not such audit. The Circuit judge did not think it necessary to order an issue to ascertain the fact, and for the purposes of the case, we will assume that some such services were rendered.

In several respects this case is like that of *The State, ex rel. Wise v. Ransom*, 9 S. C. 200, certainly in reference to the time when the alleged services were rendered, and, therefore, if there is no good reason why these services should not be paid for, they would be chargeable to the levy for which they were rendered, commencing November 1st, 1876; but the question lies back of

## Opinion of the Court.

that, whether the treasurer was bound to pay them at all, merely in the form of checks of the auditor under the act of 1874, which provided as follows: "That the treasurer of each of those above named counties shall pay to his county auditor, or his order, the sum specified in the auditor's warrant from the first collection of county funds of that fiscal year."

After the passage of this act, it was soon perceived that so far as it directed the treasurer to pay such county claims simply on the check of the auditor, it was not in harmony with other provisions of the law, but anomalous and dangerous, if not unconstitutional. The policy of the law, undoubtedly, is to subject every county claim to the examination of the board of county commissioners, the tribunal provided for that purpose by the constitution. In this view, doubtless, the legislature passed the act of March 25th, 1876, 16 *Stat.* 194, which provided as to these claims for making assessments, as follows: "And the county commissioners of the several counties shall, upon the application of the county auditors, draw their checks on the county treasurers for the several amounts to which the auditors may be entitled under the provisions of this section, and the county treasurers shall pay the said checks from the first collection of county funds of the fiscal year in which the work shall be performed. But no such check or order shall be paid by the county treasurer until the auditor shall have filed with the county commissioners an itemized statement of the services rendered by his assistants," &c.

It is true that, although passed before, this act did not take effect until after the time these services were rendered, viz., November 1st, 1876; and on that account it was held, in the case of *Wise v. Ransom*, *supra*, that it did not apply to services rendered in June, July and August of 1876. But there was another act on the statute book at that time that seems to have been overlooked, which was in active operation, and, we think, repealed so much of the act of 1874 as directed the treasurer to pay such claims as these upon the naked check of the auditor. That was the act of April 13th, 1875. "To reduce all acts and parts of acts in relation to county commissioners, their powers and duties into one act, and to amend the same." 15 *Stat.* 993.

---

April Term, 1882.

---

Section 23 of that act, after making some regulations as to numbering audited claims, provided as follows: "And after the passage of this act no claims of any class or description, drawn against any county in this State, shall be paid by the county treasurer of any county until such claims have first been examined, approved and allowed by the board of county commissioners of such county. And the said commissioners, after examining, approving and allowing such claims, shall, if there be funds in the hands of the county treasurer subject to the payment of said claims, draw their checks for the payment of said claims upon the treasurer of their respective counties, specifying the fiscal year for which the claims were contracted or incurred, and immediately cancel the said claims, and file the same in their office as a voucher for their draft. And it shall not be lawful for any county treasurer to pay any claim against the county, except upon the checks of the county commissioners of the said county, which shall bear upon their face not only the number, amount and name of the party in whose favor they are drawn, but the nature of the claims for which they are drawn, and the fiscal year in which they were contracted or incurred," &c.

This act, as stated, was passed in April, 1875, taking effect from its passage, which was before these services were rendered or checks were drawn. It expressly "repealed all acts and parts of acts inconsistent with it," and we think it repealed so much of the act of 1874 as made it the duty of the county treasurer to pay naked checks of the auditor without the approval of the county commissioners. This act was not referred to in the case of *State, ex rel. Wise v. Ransom, supra*, for the very good reason that it did not apply to that case, in which the question was made upon the order of the board of county commissioners, who had examined and approved the claim. It is important to preserve the symmetry of the law, which requires that a county treasurer shall not pay any claim against the county, except upon the check of the county commissioners, who are charged with the duty of raising the money for that purpose and giving checks for all proper county claims.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the petition for *mandamus* dismissed.

---

Opinion of the Court.

---

## CHARLESTON RICE MILLING CO. v. BENNETT &amp; CO.

1. In action by A., involving his right of way through an alleged canal over a lot of B. covered with water, both parties deriving title through one J., who held under certain partition proceedings, the presiding judge committed no error in charging the jury that the absence of any trace of the canal on a plat made at the time of the partition was "only one circumstance to be considered and was not conclusive," it appearing that J., during his ownership, marked out the canal on an old plat, and that it was referred to as a boundary and open way in the title deeds under which B. held.
2. A.'s right to the use of such a canal cannot be defeated by showing that it is crossed by a proposed street dedicated to the public, but never filled up, used, nor prepared for use.

Before KERSHAW, J., Charleston, July, 1881.

This was an action by Wm. P. Russell and Nathan Frye, copartners, under the name and style of the Charleston Rice Milling Co. against Charles S. Bennett and others, copartners, doing business under the firm name of C. S. Bennett & Co. The summons bears date January 10th, 1881. The opinion makes a full statement of the case.

*Mr. A. G. Magrath*, for appellant.

*Messrs. L. DeB. McCrady, E. McCrady, Jr.*, contra.

November 27th, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. This was an action for damages caused by the alleged obstruction of a canal running into Cooper river, the use of which was claimed to belong to the plaintiffs in common with other persons, including the defendants. Without the plat, which we cannot make a part of this opinion, it is difficult to give a clear view of the *locus in quo*, which is necessary to a proper understanding of the case, but we will endeavor to make it intelligible. The plaintiffs and defendants own rice

---

April Term, 1882.

---

mills in Charleston, situated near each other, and both within the low grounds lying between the low-water mark and the edge of the marsh of Cooper river. The mill of defendants was established first, and lies between that of the plaintiffs and the channel of the Cooper river.

The plaintiffs, having lately changed their building material factory into a rice mill, claim that there is an old canal running along the north side of their lot and through that of the defendants to the river, which they have a right to use, and which, if kept open, would enable parties in boats with rough rice to reach their mill, and that defendants, to their great damage, have obstructed that canal. The defendants, on the other hand, deny that there is any such canal through their lot which the plaintiffs are entitled to use, either by prescriptive right or by grant as an appurtenant to their lot. And these are the questions in the case.

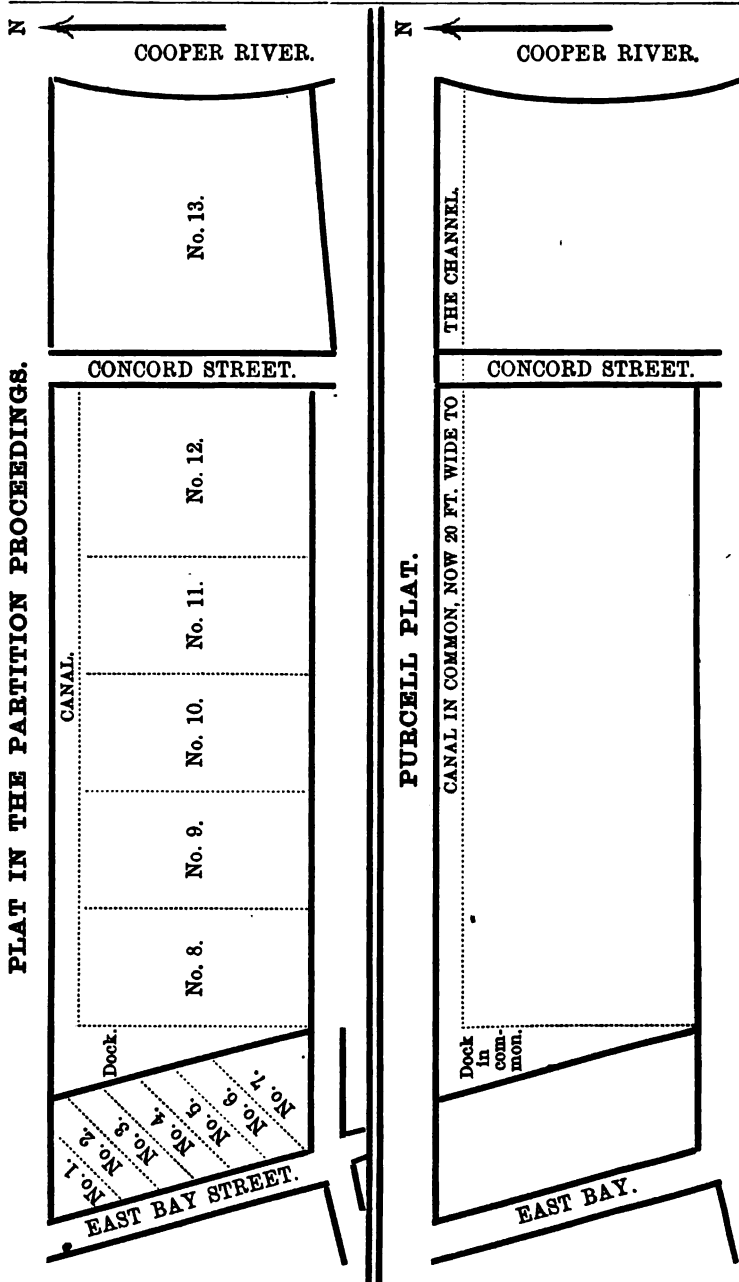
The evidence does not disclose when or by whom, or for what precise purpose the alleged canal was cut; but there is little doubt that there was once such a canal through the marsh opening into the river. The part furthest from the river, along the plaintiffs' lot, is admitted to be there now; but the defendants allege that the lower end, connecting with the river, no longer exists, or if it does, that the plaintiffs have no right to use it.

Many years ago, one William Johnson owned all these marsh lands down to Cooper river, including the lots of both plaintiffs and defendants, and it is admitted that both parties hold under him. After William Johnson died, proceedings were instituted to partition these lands. The commissioners in partition recommended that the lands should be divided into different parcels, and sold or assigned to the parties in interest, and along with their return exhibited a rude plat dividing the land into lots numbered from one to thirteen.

It seems that sometime before these proceedings, the city had ordered a street to be opened through these lands, to be called "Concord street." The site indicated for it, however, had never at this place been filled up and made an actual street, but remained in its original state as mud or water. See *Bennett v.*



Opinion of the Court.



---

April Term, 1882.

---

*Bell*, 10 *Rich Eq.* 466. On the plat of the commissioners in partition before referred to, the site of Concord street fell between lots No. 12 and No. 13, and a dotted line marked "canal" traced its course as running along the northern border of all the new made lots from No. 1 to No. 12 inclusive, but there it struck the site of Concord street, which, as stated, was covered by water, and did not go beyond through lot No. 13, lying between Concord street and the river.

Under these partition proceedings, lots No. 12, on the west side, and No. 13, on the east side of the site of Concord street, were assigned to John Johnson, Jr., as one of the heirs of William Johnson. About the year 1831, John Johnson, Jr., died, leaving a will whereby he devised all of his property to his executor, first to pay debts and then to his wife, Mary, during her life, with remainder over to his brother, Dr. Joseph Johnson. Sometime after, when Dr. Joseph Johnson and Mary Johnson owned all the lands through which, as alleged, the canal runs, it appears that upon an old plat of the premises, made by one Joseph Purcell, in 1821, the said Joseph Johnson drew two lines indicating the canal, which, corresponding with that marked on the partition plat, as far as that went down to Concord street, extended beyond that point to the river, and wrote between the lines the following words: "Canal in common, now twenty feet wide to the channel."

In 1834, after this declaration, Dr. Joseph Johnson and Mary Johnson conveyed lot No. 13 to Richard Fordham, with the following description: "All that tide lot \* \* \* bounded to the north on land laid out as a canal for the use of certain heirs of William Johnson, deceased, \* \* \* and to the west on Concord street, together with the right to use and enjoy the said canal on the north," &c. This is the lot to the east of Concord street, now owned by the defendants under this title to Fordham, to whom it was first conveyed. In 1849, Joseph Johnson and Mary Johnson conveyed lot No. 12 to William Bell, with this description: "All that water lot \* \* \* butting and bounding to the north, on a canal twenty feet wide, laid out for use in common of sundry heirs and assigns of William Johnson,

R

---

Opinion of the Court.

---

father of the above-named Johnson ; to the east on land of W. J. Bennett & Co." This is the lot now owned by the plaintiffs, under this title, to the west of Concord street.

The defendants claim that if the canal ever had an existence through their lot to the channel, as indicated by Joseph Johnson on the Purcell plat, it was discontinued, and the plaintiffs, as owners of lot No. 12, have no right now to the use of it for two reasons—first, that there was not, on the partition plat under which they held, any trace of the canal east of the site of Concord street, and, second, that the said Concord street, dedicated by the city, cuts the line of the supposed canal at nearly a right angle, and, although now merely a street in theory, would certainly, if ever filled up, cut off and render useless as a canal all that part of it lying between that point and the river.

The case came on for trial before Judge Kershaw. Much testimony was offered, especially upon the claim as to the use of the canal relied upon to give the plaintiffs a right by prescription. But upon this subject the judge charged that, as the alleged canal through the lot of the defendants was under an open sheet of water and not appearing on the surface, the evidence did not establish such a use of the water on the precise line of the unseen canal, as to give a prescriptive right to its use, and there being no exception to this charge, we need not pursue this branch of the subject farther.

Upon the other points involved, the judge charged as follows : "The plaintiffs having derived their title under this partition, are entitled to enjoy the attendant right to the use of the canal as established by the decree in partition. The question therefore is, what was that canal as established by the decree? \* \* \* You will not understand me as indicating any opinion on this subject, but merely calling your attention to all the evidence and instructing you that the plat accompanying the partition is not conclusive, but may be considered by you, in connection with other circumstances, and the action of the parties under it may be determined by all the evidence before you, including the admission of the parties as contained in their deeds and all their conduct in relation to it, as indicating the understanding which followed the land into the hands of the persons who were after-

---

April Term, 1882.

---

wards the owners of it. My impression of that plat made by the commissioners is, that it is so ambiguous that it throws you upon the evidence in the case wherever the fact that the canal does not extend beyond Concord street, is a material point. This Concord street seems to have been dedicated at some time to the use of the public, and you are to determine from that circumstance, whether that is or is not a reasonable fact which would tend you to the belief that the canal was to stop at that street because there was to be a street there. But in regard to the effect of a street laid out and not dedicated, although the city may have opened and filled up that street at any time, that circumstance would not be conclusive of the right of the plaintiff to use the canal beyond the street, if, in point of fact, they had the right to do so attendant upon their title. The street when established might possibly abridge their use of the privilege, but until actually occupied as a street, the land is open to the use of the adjacent proprietors," &c.

The jury found for the plaintiffs damages in the sum of \$315, and the defendants appeal to this court upon the following exceptions:

1. Because there was not any proof of a dedication of the alleged canal, nor proof of acceptance or user.

2. Because an act of dedication involves a designation of the object dedicated, the purposes of the dedication, and the persons to whom and for whom such dedication is made. And in all of these respects the evidence was wanting, particularly in the two last named, concerning which there was no evidence.

3. Because there was not any evidence of user to give right by prescription, and the non-user in any way had continued so long as to bar a right claimed under deed.

4. Because the plaintiff must recover, if at all, on his own title, and that to be proved as set forth in their complaint. And the right set forth in their complaint and in their title, was contradicted by the proof produced at the trial.

5. Because a dedication, public in its nature, requires more than the proof of a mere intention; it must be accompanied by certain positive acts. And if private, because limited to a cer-

---

Opinion of the Court.

---

tain person or persons, the right claimed by such person or persons must be clearly established by such person or persons.

6. Because the legal effect of a deed or of deeds must be decided by the terms of such deed or deeds, and these terms cannot be varied by circumstances or matters outside of such deed or deeds.

7. Because a right to claim damages results only from a wrong done in the violation of some right, and there was not any proof of a right to be violated, consequently no wrong done for which damages could be given.

8. Because his Honor, the presiding judge, should have instructed the jury as is set forth in the preceding propositions.

As we understand it, the right claimed on the part of the plaintiffs to have the use of the canal, is not a public right belonging to all persons, but a private right as an incident of the ownership of their lot, which came to them as assigns of the Johnsons, with the right to use the canal over all other lands derived from the Johnsons; that they have to that effect a covenant running with the land. If the right exist, it is a private right resting in grant, and there is no question of dedication to the use of the public or acceptance involved.

The case seems to have turned entirely upon two questions, whether the canal, which the plaintiffs were entitled to, ever extended east of Concord street to Cooper river; and if so, whether the defendants have obstructed it. These were both questions of fact, and being an action at law, this court has no right to review the evidence or do more than correct any error of law, which may have been committed.

There were no requests to charge, and we do not see that any specific error of law is charged in the exceptions, unless it may be involved in the instructions of the judge that neither the absence of a trace of the canal on the partition plat, beyond the proposed site of Concord street, nor the mere dedication of that street without its being filled up, was conclusive against the rights of the plaintiffs. We do not think it was error in the judge to tell the jury that the absence of a trace of the canal on the partition plat, beyond Concord street, was only one circumstance to be considered with others, and was not conclusive

---

April Term, 1882.

---

as to its non-existence beyond that point. The canal was not traced on the partition plat, but there was no negation as to its existence beyond. That was not a case for the application of the principle of *expressio unius est exclusio alterius*. As said by the judge, it may be that it was not thought necessary to mark the canal "further than where it entered upon open water." It was admitted that down to the site of Concord street there was a canal as marked on the plat, and from the nature of a canal it would seem probable that it had an outlet or vent to the river.

But be that as it may, after partition, both lots belonged to Dr. Joseph Johnson and Mary Johnson; and whilst they were the owners, it was acknowledged and marked on an old plat that the canal did go to the channel. The parties, in one sense, do hold under the partition proceedings, but through Dr. Joseph Johnson and Mary Johnson, and any explanation which they made of those proceedings bound them and went along with the lands into the hands of their alienees. *Elliott v. Rhett*, 5 Rich. 406.

It is true that the plaintiffs must recover upon the strength of their own case; but when the action is for obstructing a right of way, we see no reason why the plaintiffs' right to recover might not be shown by the admissions of the defendants. They had no higher right than was conveyed by Joseph Johnson and Mary Johnson to Fordham in 1834, and thence down to them. They purchased, subject to the easement as declared by the successive deeds in their chain of title. As late as 1871, in the deed from W. J. Bennett to C. G. Memminger, executor of Thomas Bennett, their lot is described as "all that tide lot, \* \* \* butting and bounding north on a canal, laid out for the use of certain heirs of William Johnson; east, on the channel of Cooper river; south, on dock twenty feet wide, owned and used in common between Robert Eason and the devisees of John Johnson, deceased, and west on Concord street, together with a right to use and enjoy the said canal on the north, and dock on the south, in common with such other persons as are now or may hereafter become entitled to use and enjoy the same in common," &c. The defendants are estopped

---

Syllabus.

---

from denying that the canal crossed Concord street and ran along the northern boundary of their lot held from the John-sons.

As to the effect of the simple dedication of Concord street, without its being filled and actually made a street, we concur with the judge. Laying out a road or dedicating a street to the use of the public does not divest the title of the adjacent proprietors to the land on which it is projected; but their rights remain the same, subject to the easement created. Whether Concord street shall be filled up and prepared for use as a street, and if so, what effect that would have upon the canal called for by the title deeds of the parties, are matters between the plaintiffs and the authorities of the city, which are not before us, and as to which we make no ruling. All we mean to say is, that in the present condition of things, the defendants cannot defeat any right to the use of the canal which may otherwise exist, by showing that the proposed street, if actually made, would cross that canal.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

GUNTER v. GRANITEVILLE MANUFACTURING COMPANY.

1. Where the presiding judge said to the jury concerning requests to charge "that most, if not all, of them were in accordance with the law as understood by me, and already laid down in my charge," but "were declined so far as they contained matter inconsistent with the instructions already given," a request to charge cannot be said to have been refused unless shown to be inconsistent with the general charge.
2. A workman, employed by a cotton manufacturing company to keep the machinery of the mill in repair and good working order, is not a fellow-servant with a weaver in the factory in such a sense as to exempt the employer from liability for an injury to the weaver caused by the negligence of such workman.
3. A master is liable for any injury to his servant caused by his own negligence, or by the negligence of any person representing him; and a person employed to do anything which it is the master's duty to do—as *e. g.*, in a cotton factory, to employ the operatives and discharge them when incom-

---

April Term, 1882.

---

petent or careless, to provide suitable machinery, and to keep it in proper repair and safe working order—is the master's representative.

4. In action against a corporation for damages, an employe of the company was called as a juror and examined on his *voir dire*; after answering in the negative the statutory questions, he was asked by the court if he was an employe of the defendant, and the juror said he was, whereupon he was excluded. *Held*, that the question was proper, and that the propriety of this juror's exclusion was a matter wholly within the discretion of the presiding judge.
- 

Before KERSHAW, J., Aiken, September, 1881.

This was an action by Marina S. Gunter against the Graniteville Manufacturing Company, commenced October 4th, 1879, for \$10,000 damages for the loss of an eye, caused by a shuttle flying from its place while a loom was being repaired, in work hours, by one Harling, the loom repairer. The case was tried in September, 1880, and a verdict was rendered for plaintiff for \$2,000. On defendant's appeal, a new trial was granted; and at this second trial the verdict was for plaintiff, \$5,400.

The judge's charge was as follows:

In order that the plaintiff may recover, it must appear to you that the facts alleged in the complaint are true as alleged therein. That the plaintiff was employed by the defendant company at the time of the alleged injury. That the defendant was negligent in providing and using unsafe, defective and insecure machinery, or in causing the machinery to be repaired during working hours, and when the plaintiff was compelled, in the performance of her duty, to be so near the same as greatly to endanger her person. That the plaintiff suffered the injury complained of. That the injury was caused by the alleged negligence of the defendant.

The whole law of this case is laid down in the opinion of the Supreme Court read in your hearing, and you will take that as a part of this charge. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done, the



---

Judge's Charge.

---

essence of the fault being either in the omission or commission of the duty.

To apply this definition to the conduct of the defendant, it was their duty to provide and use such machinery only as a reasonable and prudent person would ordinarily have done, under the circumstances of the situation in which they were. It was their duty to keep the same in repair as a reasonable and prudent person would ordinarily have done under the same circumstances. It was their duty to repair, or cause to be repaired, the machinery at such hours and in such manner as a reasonable and prudent person would have done under the same circumstances.

If the defendant company has failed in these duties, or any of them, they have been negligent in a legal sense, and if the plaintiff has been injured as the direct result of such negligence, the defendant is liable, unless it appeared that there are other circumstances in the case which will excuse the company from liability. For if the injury complained of was not entirely occasioned by the negligence or improper conduct of the defendant, but would, notwithstanding such faults of the defendant, have been avoided, but for the negligence or want of ordinary care on the part of the plaintiff, the defendant is entitled to the verdict. So, also, if the injury was not entirely occasioned by the negligence or improper conduct of the defendant, but would have been avoided but for the negligence or want of ordinary care on the part of a co-laborer of the plaintiff, the defendant is entitled to a verdict, unless it appear that the defendant had not used ordinary care and reasonable prudence in the selection of such a co-laborer, it being a principle of law, that the employe assumes the risks incident to his employment, one of which is the negligence of a co-laborer. The company is liable for the negligence of its officers and agents to whom it delegates the control of its business and operatives, and the performance of their duties, but not for that of a co-laborer of the plaintiff.

The term co-laborer embraces all those employed in performing any portion of the work of the cotton mill, in which the plaintiff was employed, in any of its departments, but not a workman employed to keep the machinery in repair, though in some respects a fellow-servant or co-laborer. As to what con-

---

April Term, 1882.

---

stitutes a middle man, or such an officer or agent as to represent the company as to make it liable for his negligent acts or omissions, I will read a passage from the case of *Buckner v. The New York Central Railroad Company*, cited in 31 *Am. Rep.* 515, 516. \* \* \*

If then you find that the plaintiff has suffered the injury complained of as a direct result of the negligence of the defendant or its representatives, you will proceed to enquire whether it could have been avoided by the exercise of ordinary care or prudence of the plaintiff, or of any co-laborer whose want of care contributed directly to the injury, for if such want of care on the part of the plaintiff or her co-laborers in any way contributed to the cause of the injury, the defendant would not be liable, for when the injury in part was caused by the negligence of the plaintiff, and in part by negligence of the defendant, or of a co-laborer, the court will not distinguish between these contributing causes, but will refuse to interfere.

The questions are, was the injury complained of caused by the use of defective machinery as alleged? Were such defects known to the defendants, or might they have known of such defects by the use of ordinary care and prudence? Or was it caused in any part by the repairing of the machinery during the work hours? If so, was that a want of reasonable care and prudence on the part of the defendants, or was it caused by a want of reasonable care and prudence on the part of the workmen appointed to repair the machinery? If so, then the defendants would be liable, unless you find that the negligence or want of reasonable care and prudence on the part of the plaintiff, or on the part of a co-laborer, contributed to the cause of the injury, as I have before stated.

What act is there on the part of the plaintiff which she ought not to have done, as a reasonable and prudent person, which contributed as a cause to her injury? If you find any such, she cannot recover. What ought she to have done, as a reasonable and prudent person, to avoid such injury which she did not do? If you find any such neglect on her part that contributed as a cause of the injury, she cannot recover. If you find no such negligence on the part of the plaintiff, then apply the same test

## Opinion of the Court.

to the conduct of any co-laborer of the plaintiff having any connection with the accident. If you find any such contributory negligence on the part of any co-laborer of the plaintiff, she cannot recover.

But if you find that the injury was caused entirely by the negligence of the defendant company or their agents, middlemen or representatives, your verdict should be for the plaintiff. If you find for the plaintiff, you must find such a sum of money as you may think should reasonably compensate her for the injury she has sustained, the loss of time, mental and bodily suffering, loss of eyesight, and other permanent injuries and disabilities. [Here the learned judge read the fifth syllabus in *Hough v. Railway Company*, 10 Otto 214, as a part of his charge.]

The defendants moved for a new trial, which being refused, they appealed to this court on the exceptions stated in the opinion.

*Messrs. D. S. Henderson and Youmans*, Attorney-General, for appellants.

I. On the request to charge, first considered by this court, the following authorities were cited: 24 *N. Y.* 442; *Prof. Jury Tr.*, § 337; *Shearm. & R. Negl.*, §§ 87, 88, 92; *Wood M. & S.* §§ 331, 332, 333, 452; 32 *Md.* 411; *Cooley M. & S.* 7-13; 2 *Thomp. Negl.* 971; 1 *Add. Torts* 904. II. Counsel cited *Wood M. & S.*, § 326; *Cooley M. & S.* 6-11; 50 *Geo.* 465; 55 *Id.* 133; 58 *Id.* 490; 25 *N. Y.* 565. III. Counsel cited *Wood M. & S.*, § 327; *Shearm. & R. Negl.* 94. IV. Upon the next request to charge, and the alleged error in the charge, considered together by the court, counsel cited *Cooley M. & S.* 3-18; *Wood M. & S.*, §§ 393-396; 39 *N. Y.* 468; 53 *Id.* 549; 12 *Otto* 213; 9 *Cush.* 113; *Shearm. & R. Negl.*, §§ 100-110; *Prof. Jury Tr.*, § 344. V. On last request to charge, *Wood M. & S.*, § 419; *Cooley M. & S.* 18; *Shearm. & R. Negl.*, § 99.

*Messrs. W. W. Williams, O. C. Jordan, G. W. Croft*, contra.

November 27th, 1882. The opinion of the court was delivered by

---

April Term, 1882.

---

MR. JUSTICE McIVER. This being the second appeal in this case, it will not be necessary to make any further statement of the case than such as may be sufficient for a proper understanding of the points raised by this appeal, inasmuch as a full statement may be found by reference to the case as reported in 15 S. C. 443. The points now raised arise upon the alleged refusal of the Circuit judge to charge certain propositions of law as requested by the defendant, and upon exceptions to the charge, and to the organization of the jury.

The first request, which appellant insists was erroneously refused, is as follows: "That manufacturing companies, as between them and their employes, are not bound to use such appliances as are of the best or most approved description. If they supply such as are reasonably safe, and have been sanctioned by use, they do all that the law requires. There is, in short, no implied warranty that the materials furnished by the master shall be sound and fit for the purpose, nor that the servant shall not be exposed to extraordinary risks." It will be observed that the Circuit judge did not refuse to charge all of the propositions requested, but, on the contrary, in his settlement of the case, he says:

"At the conclusion of the charge, the jury were told that various requests to charge had been preferred by the counsel on either side, which they had heard read; 'that most, if not all, of them were in accordance with the law as understood by me, and already laid down in my charge; that I declined the requests to charge, on both sides, so far as they contained matter inconsistent with the instructions already given them,'" so that unless it appears that there was something in this request inconsistent with the instructions already given to the jury, it cannot be properly said that this request was refused.

The judge's charge was reduced to writing and is set out in the "Case," and need not be repeated here. Upon a careful examination of the charge, we are unable to discover anything in it which is inconsistent with the proposition contained in the first request. On the contrary, the jury were instructed that it was the duty of the defendant "to provide and use such machinery only as a reasonable and prudent person would ordinarily

---

Opinion of the Court.

---

have done under the circumstances of the situation in which they were." This necessarily implied that the defendant was "not bound to use such appliances as are of the best or most approved description," but only such as a reasonable and prudent person would ordinarily have used under similar circumstances. There was, therefore, not only no inconsistency, but the proposition asked for was, in effect, charged.

The next request, which it is alleged was erroneously refused, was in the following language: "That the plaintiff having been injured by the flying out of a shuttle from a loom, upon which she was a weaver, if the jury find that she knew, when she undertook her employment, and during her continuance thereon, that the flying out of shuttles were matters of ordinary occurrence in the factory, and incident to the employment which she undertook, then she cannot recover, and the verdict must be for the defendants." This request also contained nothing inconsistent with the charge, but on the other hand was embraced in it. It involved the proposition that when one voluntarily engages in a service to which it is known that certain risks are incident, he assumes such risks, except where they result from the negligence of the employer or of any person who represents him. This proposition is distinctly announced in the opinion of this court at the hearing of the former appeal, which the Circuit judge had read to the jury as part of his charge, and in addition to this said, in so many words, to the jury, "that the employe assumes the risks incident to his employment." There is, therefore, no foundation for the charge of error in this respect.

The next request, which appellant claims was improperly refused, was as follows: "That if the jury find that there was once a shuttle-guard upon the loom in question, their next inquiry should be, how long that shuttle-guard had been removed before the accident, and if they find that the shuttle-guard had been absent any reasonable length of time before the accident, and without any complaints of its absence by the plaintiff, but that she worked upon the loom with it off, then the defendants are not to blame for its absence, and the verdict must be for the defendants." This request is based upon the doctrine of contributory negligence, and we think the law upon that subject

---

April Term, 1882.

---

was fully and correctly expounded to the jury. There was nothing in this request inconsistent with the charge, and it was, in effect, adopted by the Circuit judge and laid before the jury.

The next request was in these words: "That if the jury find that the company exercised ordinary skill and caution in the purchasing of machinery, and the employment of competent and reliable persons to keep the same in order and superintend its working, then they have performed all their duty as employers to their employe, the plaintiff, and she cannot recover." This involves the proposition that the employer's duty is fully complied with when he has exercised ordinary care in furnishing suitable machinery, and in the employment of competent and careful persons to keep the same in repair, and that his duty does not require him to go further and see that all needful repairs are made. A similar proposition is involved in the exception to the charge, which was "that his Honor erred in instructing the jury that 'the term co-laborer embraces all those employed in performing any portion of the work of the cotton mill, in which the plaintiff was employed, in any of its departments, but not a workman employed to keep the machinery in repair, though, in some respects, a fellow-servant or co-laborer,' because it is submitted that in order to constitute a 'workman employed to keep the machinery in repair,' a middleman or representative of the company, said workman must have the power to employ and discharge hands, and purchase and change machinery, and said charge being intended to apply to the position of the witness, Harling, without such qualification, was calculated to mislead the jury, and was erroneous." This request, and the exception to the charge will, therefore, be considered together.

Who is embraced within the terms co-laborer or fellow-servant is a question which has been the subject of no little discussion, and the authorities are somewhat conflicting. The question has been presented to different courts in various aspects, but we propose to confine our attention to the form in which it is here presented. Is a workman, employed to keep the machinery of a cotton mill in repair and in good working order, a co-laborer or fellow-servant with an operative employed to attend one or more

---

Opinion of the Court.

---

looms as a weaver, in such a sense as to exempt the employer from liability for an injury caused by the negligence of the person employed to keep the looms in repair and proper working order? The rule seems to be well settled that the master is liable to his servant for any injury caused by his own negligence, or by the negligence of any person representing him. It would seem to be clear that any person employed by the master to do anything which it is the duty of the master to do, is his representative. It undoubtedly is the duty of the master to employ the laborers who are to operate the machinery, and discharge them if incompetent or careless; and, therefore, any person to whom this duty is delegated by the master is undoubtedly his representative, and the master would be responsible to his servant for any injury caused by the negligence of the person to whom this duty has been delegated.

So, too, it is conceded to be the duty of the master to provide suitable machinery for the use of his operatives; and if he delegates this duty to another, he is responsible to his servant for any injury caused by the negligence of any person to whom the performance of this duty has been entrusted. It is, likewise, the duty of the master to keep the machinery in proper repair and safe working order; and if he entrust the performance of this duty to another, we see no reason why he should not be held liable for injury to one of his servants, caused by the negligence of the person employed to perform this duty which it is incumbent upon the master to perform.

The test as to whether an employe is the representative of the master is, not whether such employe has the power to employ or discharge hands, or to purchase or change machinery, for, while these are some of the duties of the master, they are not all of his duties, and hence, an employe who is not entrusted with either of these powers may still be the representative of the master. The true test is whether the person in question is employed to do any of the duties of the master; if so, then he cannot be regarded as a fellow-servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master

---

April Term, 1882.

---

thus delegated to him must be regarded as the negligence of the master.

These views are fully supported by authority from other States, though, so far as we are informed, there is no case in this State directly upon the point now under consideration. *Murray v. The South Carolina Railroad Company*, 1 McM. 385, was a case in which a fireman on a locomotive was injured by the negligence of the engineer, and simply decided the general proposition that a master is not liable to one of his servants for an injury caused by the negligence of a fellow-servant, and does not purport to decide who is embraced within the term, fellow-servant. The case of *Conlin v. The City Council of Charleston*, 15 Rich. 201, turned upon the question whether the person whose negligence caused the injury was a servant of the city council or of an independent contractor.

There are decisions, however, in our sister States, in which the question has been distinctly raised and decided in conformity with the views hereinbefore advanced, and these cases appear to be fully sustained, both by reason and authority. In *Ford v. Fitchburg Railroad Company*, 110 Mass. 240 (14 Am. Rep. 598), a fireman was injured by reason of a defect in the engine, which was due to the neglect of the employes of the company charged with the duty of keeping the engine in repair, although the company had no reason to suspect negligence or incompetency on the part of such employes, and it was held that the company was liable. In that case the court used the following language: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risk of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of sup-



## Opinion of the Court.

plying safe machinery, are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant."

*Corcoran v. Holbrook*, 59 N. Y. 517 (17 Am. Rep. 369), was a case in which an operative in a cotton mill was injured by the fall of an elevator, which was not kept in proper repair, and it was held that the master was liable. It is true that, in that case, the injury was attributable to the negligence of the general agent, to whom the defendant had entrusted the management of the mill, but the principle upon which the decision rests, shows that the liability of the master was fixed, not because the injury resulted from the negligence of a general agent, but because it was the duty of the master to supply and maintain suitable machinery, and if this duty was neglected, it did not matter to whom such duty was entrusted, the master would be liable. The court used this language: "It was the duty of the defendants towards their employees to keep the elevator in a safe condition, and to repair any injury to it which would endanger the lives or limbs of their employees, who were lawfully and properly, in the performance of their functions, in the habit of using it. That duty they delegated to their general agent. As to the acts which a master or principal is bound as such to perform towards his employees, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and held liable for the manner in which they are performed."

In *Brann v. Chicago, R. I. and P. R. R. Co.*, 53 Iowa 595 (36 Am. Rep. 243), a brakeman on a railway train was injured by reason of the failure of an inspector to perform his duty, and the company was held liable. After laying down the proposition, that it was the duty of the corporation, not only to provide, in the first place, suitable and safe machinery and appliances, but also to see that that they are kept in repair, the court said: "As the corporation must act through agents and employees, the negligence of the employees, upon whom the duty of inspection is devolved, is the negligence of the corporation," and cite a number of authorities to sustain the proposition.

---

April Term, 1882.

---

In *Fuller v. Jewett*, 80 N. Y. 46 (36 Am. Rep. 575), an engineer on a railway was killed by the explosion of the boiler, resulting from a failure to keep it in proper repair, and it was held that the defendant was liable, although he had employed a competent superintendent of repairs and master mechanic, and made proper regulations, and the negligence was that of the mechanics directed to make the repairs. The defense was, that the negligence of the mechanics employed to make the repairs was the negligence of a fellow-servant, and, therefore, under the admitted rule, the employe was not liable for the injury sustained by one of his other servants; but the court said, "that acts which the master, as such, is bound to perform for the safety and protection of his employes, cannot be delegated so as to exonerate the former from liability to a servant, who is injured by the omission to perform the act or duty, or by its negligent performance, whether the non-feasance or misfeasance is that of a superior officer, agent or servant [or] of a subordinate or inferior agent or servant to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant, whose negligence caused the injury, or of the fact whether it was, or was not, practicable for the master to act personally, or whether he did, or did not, do all that he personally could do, by selecting competent servants, or otherwise to secure the safety of his employes." And again, the court said, "the duty of maintaining machinery in repair for the protection and safety of employes is the same in kind as that of furnishing a safe and proper machine in the first instance." See, also, *Hough v. Railway Company*, 100 U. S. 213.

We are aware that there are cases, some of which have been cited by appellant, that seem to be in conflict with those above cited; but an attentive examination of those cases will show that they either ignore, or do not give full weight to what we

## Opinion of the Court.

regard as the only true test as to whether the person in question occupies the position of a fellow-servant to the servant who is injured or is a representative of the master, and that is, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master. It is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the use of his operatives; and, we think, it is also settled that his duty does not stop there, but that it is likewise his duty to keep such machinery in proper repair and safe working order, and if these duties, or either of them, are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have entrusted the performance of such duties to subordinates, by whatever name they may be called, and even though the master may have exercised due care in the selection of such subordinates. We think, therefore, that the request to charge, which we have been considering, was properly refused, and that the exception to the charge cannot be sustained.

Finally, the defendant requested the Circuit judge to charge, "that the burden of proof is upon the plaintiff, to show that those who are employed by the defendants to superintend their work are incompetent, and they are presumed to be competent until shown to be otherwise by competent testimony." We see nothing in this request inconsistent with the charge of the Circuit judge, and, therefore, it cannot be said that it was refused. Indeed, we do not perceive its applicability to the case as made, inasmuch as there does not seem to be any pretense that the injury complained of resulted from any negligence on the part of "those who were employed by the defendants to superintend their work." But even conceding its applicability, its correctness was recognized by the former decision in this case, which was read to the jury as part of the judge's charge.

The only remaining question is as to the organization of the jury. It seems that one of the jurors presented was, on the motion of the plaintiff, examined on his *voir dire*, and to the question indicated by the statute (*Gen. Stat. of 1872*, 523, § 25), he answered in the negative. He was then asked by the court whether he was in the employment of the defendant, to which

---

April Term, 1882.

---

he replied that he was. In his settlement of the "Case," the Circuit judge says: "It appeared to me his relation to the defendant might (unconsciously to himself, perhaps,) prevent him from being wholly indifferent between the parties, and for that reason he was excluded." To this exception was duly taken. The statute above referred to reads as follows: "The court shall, on motion of either party in suit, examine on oath any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause, and another shall be called."

The provision of the act, that "any other competent evidence in support of the objection" may be introduced, shows that negative answers to the questions indicated are not conclusive. This additional evidence may be obtained from answers of the juror to such additional questions as may be propounded to him by the court, as well as from any other competent source. The language of the act "if it appears to the court that the juror is not indifferent," shows that it is the mind of the judge before whom the case is tried, which is to be satisfied as to whether the person presented as a juror is a suitable person to serve as such, and, therefore, when, as in this case, the judge was not satisfied upon this point, we certainly cannot undertake to say that he should have been satisfied. This exception cannot be sustained.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

LASURE v. GRANITEVILLE MANUFACTURING COMPANY.

1. After verdict in favor of plaintiff, alleged errors of the Circuit judge, in his charge to the jury, either of omission or commission, relating solely to the right of recovery and not affecting the measure of damages, are immaterial to plaintiff, and will not be considered on his appeal.

---

Judge's Charge.

---

2. In action against a corporation for damages sustained by plaintiff while in their employment, the Circuit judge did not err in refusing to charge the jury "that even if the jury find there was a defect in the tramway known to the company, yet, if they find that the plaintiff also knew of said defect, or by the exercise of ordinary care and diligence could have known of it, and still voluntarily continued in the employment of the company, he cannot recover," for these are questions of fact to be determined by the jury under all the circumstances of each particular case.
3. The exercise of due care and diligence in ascertaining whether machinery or other appliances furnished an employe to work with, are kept in proper repair, is the duty of the master and not of the servant.
4. A master must provide his servants with safe and suitable machinery and appliances necessary for their work, and must also keep them in repair, and is liable to those servants for injuries resulting to them from his negligence in these matters, or for the negligence of mechanics or other subordinates employed by him to perform these, his duties.
5. *Gunter v. Graniteville Manufacturing Company*, ante p. 262, approved.

---

Before ALDRICH, J., Aiken, April, 1880.

This was an action by Thomas J. Lasure against the Graniteville Manufacturing Company, commenced November 21st, 1877. The complaint demanded \$10,000 damages for injuries sustained in a fall; and the proof was that plaintiff's arm was broken, wrist dislocated, hip injured and slightly dislocated, and his face cut from forehead to chin.

The charge of the judge to the jury was as follows:

You will bear in mind that this case is not to be determined by the rule which applies to common carriers. When a railroad or steamboat company, or a stage coach, or any other conveyance for public travel, undertakes to carry passengers for hire, their contract is they will carry them safely, and they are liable in damages for any injury that may be received, except the same may be from the act of God or the public enemy. Hence, if a corporation undertakes to carry you or your goods from one place to another, for hire, it is liable for any injury to the person or loss of goods, whether it be from unavoidable accident or carelessness. But such is not the rule, as applied to employes in a factory or a railroad, or in any other industrial occupation. In such case, when a man engages to work for wages, he takes a

---

April Term, 1882.

---

certain amount of risks himself, and if an injury is received in the business in which he engages, the employer, be it railroad, factory or steamboat company, is not liable in damages unless it be made to appear clearly to you that the injury so received is the result of carelessness or negligence on the part of the employer.

There can be no doubt that this plaintiff has been injured, and seriously injured. His face was cut open, his arm broken, and his hip injured. He has suffered great bodily pain and anxiety; been confined to his bed for weeks, prevented from the labor by which he made a sustenance, and a burden to his family and friends. Nay, more, he is still suffering from the injuries received at the time of the accident. If all this be the consequence of negligence or wanton carelessness on the part of the defendant, the Graniteville Company, they are liable in damages, and should be made to pay the penalty for their neglect. On the other hand, however, if this be one of the risks which every operative takes when he engages in the business of a factory, however great may be his injury, however painful his suffering, however permanent his hurt, the company is not liable, because it is one of the accidents which may or may not occur, and of which he takes the risk for hire.

So that the first question presented to you is: Was the defendant guilty of carelessness or negligence which occasioned the injury, the pain, the anxiety and the loss of time of which the plaintiff complains? The law makes you the sole judges of that question. I cannot assist you. In considering it, you will ask: Was this structure safe, or was it carelessly constructed? Was it kept in good repairs by ordinary diligence? Did the defendant show that solicitude and concern for the safety of the persons in their employment which men of ordinary prudence exhibit in the conduct of their affairs? Was it one of those accidents that might have happened under the exercise of ordinary prudence, or was it the result of carelessness and neglect? If the former, the company is not liable, because that was one of the risks the plaintiff took when he contracted to receive wages for his labors. If the latter, the company is liable, because the undertaking of the plaintiff was to work for wages, protected

---

Judge's Charge.

---

by the ordinary diligence which prudent men exercise in the conduct of their affairs. These are questions for you, and as you resolve them, so will be your verdict.

Another question for your serious consideration is: Did the plaintiff contribute to this accident by his own negligence, or by his violation of the rules of the company? And in this connection you will consider what was the rule of the company whose servant he was. Was it a rule when a bale fell off the truck the employe was to send for the officer who had the road in charge? Did he throw that bale of cotton with a sudden jerk, or did he lower it easily on his truck? Would the road have broken if the plaintiff had not thrown down the bale? Now, if he violated the rules of the company or recklessly threw his bale from the edge to the side on the truck or the platform, so as to occasion a sudden jar, which broke the support of the shoulder resting on the sill of the factory, did he not contribute to the accident? If so, the company is not liable, because he was deficient in that prudence which men ordinarily display in the exercise of their business.

These are questions for your solution. As you solve them, so will be your verdict. While these great enterprises are to be held to the strictest responsibility, and made to pay for any damage resulting from their carelessness or negligence, yet they are not to be bled and stripped of their earnings because they are rich. By united capital they do that which individual capital cannot accomplish. They increase the general wealth of the State, which permeates society and adds to the industrial labor of the county. They employ, at liberal wages, hundreds of our people, men, women and children; furnish them with comfortable houses, good schools for the education of the rising generation, and help support the government by taxation. Hence you are to decide the case on the law and the evidence, not considering the poverty of the plaintiff or the wealth of the defendant. But while these corporations are dispensing these blessings, adding to the wealth of the State and increasing the comfort and happiness of the people, they must protect those whom they employ, and whenever one of their employes is

---

April Term, 1882.

---

injured because of their carelessness or negligence, they are liable.

You are not to find a verdict because the plaintiff is a poor man and the defendant a rich corporation, but according to truth and justice. Remember this court is no respecter of persons—each case must be tried by the law and evidence applicable thereto. In all such cases there is a great deal of vociferation and earnest declamation about rich corporations and poor men, hard working laborers. You have nothing to do with this. Render your verdict as between man and man. A corporation is simply the aggregation of individuals. In that union you will find capitalists, men of moderate means and widows and orphans. These aggregated make the corporation, and all of these—the capitalist, the man of moderate means and the widow and orphan—are as much entitled to your consideration and sympathy as the plaintiff. So, gentlemen, you will dismiss from your minds, “bloated corporations, wealth, large dividends, poor laborers,” and decide this case as between man and man, by the law and the evidence.

*Messrs. W. T. Gary, G. W. Croft, for plaintiff.*

*Messrs. Henderson Bros., contra.*

November 27th, 1882. The opinion of the court was delivered by

MR. JUSTICE McIVER. This action was brought by the plaintiff, who was a laborer in the employment of the defendant, a company carrying on a cotton factory, to recover damages for injuries sustained by reason of the alleged negligence of the company. It appears that the plaintiff was engaged in removing cotton bales from the warehouse to the mill of the company, by rolling them on a truck over an elevated tramway between the two buildings, and, while so doing, the tramway gave way by reason of the splitting or breaking of some of the timbers, which supported the track, and the plaintiff fell and sustained the injuries for which the action was brought. Both parties presented to the Circuit judge sundry requests to charge, which



## Opinion of the Court.

were neither specifically refused or granted, and the case was submitted to the jury under a charge to which no exception was taken by either party. The jury found a verdict in favor of the plaintiff for \$500, and judgment being entered thereon, both parties have appealed, alleging, as error, the refusal or neglect of the Circuit judge to charge the several propositions as requested by them respectively.

It will not be necessary to consider the merits of the several propositions contained in the numerous requests submitted by the plaintiff, for every one of them relate solely to the plaintiff's right to recover, and none of them relate to the question of the amount which he was entitled to recover, or could in any way affect the question of the measure of his damages. Now, as the plaintiff has recovered, his only possible ground of complaint is as to the amount of his recovery, and we cannot conceive how he could be prejudiced by the refusal or omission to charge any proposition of law, however correct it might be, affecting only his right to recover, and not affecting the question of the measure of his damages. In cases of this kind there are always two questions, first, whether the plaintiff has made a case entitling him to recover any damages, and if so, second, what is the proper measure of his damages. The two questions are entirely distinct and different, and depend upon different principles. The plaintiff having established his right to recover, as is conclusively demonstrated by the verdict in his favor, any error on the part of the Circuit judge, either of commission or omission, in submitting the first question to the jury, becomes wholly immaterial, and need not, therefore, be considered. The appeal on the part of the plaintiff cannot, therefore, be sustained.

The defendant also appeals upon five grounds. The first and fifth were very properly abandoned, as it is manifest that they could not be sustained.

The second ground of appeal alleges that the Circuit judge erred in not charging the fourth request submitted by the defendant, which is in these words: "That even if the jury find there was a defect in the tramway known to the company, yet if they find that the plaintiff also knew of said defect, or by the exercise of ordinary care and diligence could have known of it, and

---

April Term, 1882.

---

still, voluntarily, continued in the employment of the company, he cannot recover, and the verdict must be for the defendant." We think it very clear that the proposition, or rather propositions (for there are two of them), contained in this request, are not well founded. It does not follow necessarily that a servant is guilty of contributory negligence because he remains in the service of his master after he has knowledge of defect in the machinery or appliances with which he is furnished to perform his work, but it is a question of fact for the jury to determine under all the circumstances of each particular case. *Wood on Master and Servant*, § 357, citing *Snow v. Housatonic Railroad Company*, 8 *Allen* 441.

It was, therefore, no error to refuse to charge, as matter of law, that if the plaintiff knew of the defect in the tramway, and still continued in the employment of the company, he could not recover. The other proposition involved in the request—that if the plaintiff could, by the exercise of ordinary care and diligence, have known of the defect, and still, voluntarily, continued in the service of defendant, he could not recover—cannot be sustained, not only for the reason above stated, which applies with equal force to both propositions, but also because it presupposes a duty upon the part of the servant to exercise due care and diligence, to ascertain whether the machinery or appliances furnished him to work with are kept in proper repair, whereas this is the duty of the master and not of the servant.

The third and fourth grounds of appeal, involving practically the same principles of law, will be considered together. They are based upon a refusal or neglect to charge the propositions contained in the fifth and sixth requests submitted by the defendant, which are in these words: 5. "That if the jury find that the company constructed the tramway with due skill and caution, and employed competent and reliable persons to superintend their work, then they have performed all their duty as employers to their employe, the plaintiff, and he cannot recover." 6. "That even if the jury find there was a defect in the tramway, caused by the negligence of those employes who had charge of it, yet the plaintiff cannot recover, because the negligence which

---

Syllabus.

---

caused the misfortune is not that of the company, but of fellow-employees, working under the same common head."

The principles involved in these requests have been considered and passed upon in the decision just filed in the case of *Gunter v. The Graniteville Manufacturing Company*, ante p. 262, and, therefore, we need not repeat here what was said in that case upon these points. It was there determined that it is not only the duty of the master to provide, in the first instance, safe and suitable machinery and other appliances necessary to enable his operatives to do the work for which they are employed, but that it is equally his duty to see that such machinery and appliances are kept in proper repair, and that for any negligence in the performance of either of these duties, from which an injury results to one of the operatives, the master is liable, even though these duties may have been entrusted by the master to a subordinate officer or agent, by whatever name he may be called, and without regard to the rank of such subordinate. Hence, if an injury is sustained by a servant by reason of the negligence of a mechanic, employed to keep the machinery or other appliances in proper repair, the master is liable, notwithstanding the fact that the master may have exercised due care in the selection of the agent to whom such duty is entrusted, because such duty is a duty of the master, and whether performed in person or by an agent, any negligence in the performance of it is the negligence of the master. It follows, therefore, that there was no error in refusing to charge the propositions contained in either of these requests.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

NATIONAL BANK v. GARY.

1. A note duly dated and signed by its maker, without seal, in words following: "On the first of November, 1877, I promise to pay to M. W. Gary, or order, without offset, eight hundred and eighty-six dollars, for value received, with interest from date, interest after maturity at the rate of one

---

April Term, 1882.

---

per cent. per month, having deposited with said M. W. Gary, as collateral security, seven hundred and thirty-five dollars Greenville and Columbia railroad second mortgage coupons, past due. And in case this note shall not be paid when due, I hereby give the said M. W. Gary authority to sell the said security, or any part thereof, for my account, on the maturity of this note, or at any time thereafter, at public or private sale, at his discretion, without advertising the same, and to apply so much of the proceeds of said security to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also the payment of all expenses attending the sale of the said security. If the net proceeds of the said security shall not cover the amount due on this note, I hold myself bound to pay the balance forthwith, after such sale, with interest at the rate of one per cent. per month," is a promissory note, and negotiable.

2. *Semble.* An endorsement, in blank, of a negotiable note renders the endorser liable to every subsequent holder; and in the absence of fraud or mistake, such liability cannot be affected by parol evidence.
- 

Before FRASER, J., Edgefield, October, 1880.

Action by the First National Bank of Charleston, endorsee, against M. W. Gary, endorser, commenced in April, 1879. The charge of the judge to the jury is not stated in the brief—only the plaintiff's requests to charge. Of these, five in number, only the two following are material to the points considered by this court:

1. "That the instrument sued upon in this action is a negotiable instrument, and if the defendant, for value, wrote his name upon the back of said instrument, then said defendant became liable as endorser, unless said endorsement was obtained by the fraud or deceit of the plaintiff.

2. "That the instrument sued upon is a promise to pay a sum, fixed in said instrument, without regard to the sale of the securities mentioned in said instrument; that the instrument imposed no obligation upon the holder of the same to sell said securities before demanding and requiring payment of said instrument from the maker or endorser."

These requests were both refused, and after verdict for defendant and judgment thereon, plaintiff appealed to this court, alleging error, *inter alia*, in refusing the above-stated requests.

## Opinion of the Court.

A motion by defendant to dismiss this appeal was refused. *Bank v. Gary*, 14 S. C. 571.

*Messrs. C. L. Woodward, Buist & Buist*, for appellants.

*Mr. W. T. Gary*, contra.

This instrument is not a promissory note according to the definitions. 2 *Blacks. Com.* 467; *Chit. Bills* 132; 84 *Pa. St.* 407; 1 *N. & McC.* 102, 255; 2 *Id.* 585; *Cheves* 92; 1 *Spears* 127; 1 *Strobh.* 44; 9 *Rich.* 299; 12 *Id.* 445. It is not "simple, certain, unconditional and not subject to any contingency." 19 *Wall.* 560; 4 *Moore* 471; 1 *Dan. Neg. Inst.*, § 50; 47 *N. Y.* 661; 24 *Ga.* 287; 5 *T. R.* 482; 2 *Miles* 442. The contract must be only for the payment of money, or it is not negotiable. 1 *Dan. Neg. Inst.*, § 59, and authorities cited; 77 *Pa. St.* 131; 84 *Id.* 407; 1 *Bay* 173. It is too heavily burdened for a promissory note. The rule laid down in 1 *Dan. Neg. Inst.*, § 59, that a superadded agreement, which only facilitates the means of collection, does not destroy the negotiability of the instrument, is not sustained by the South Carolina decisions, *supra*.

November 27th, 1882. The opinion of the court was delivered by

MR. JUSTICE McIVER. This was an action brought by the plaintiff, as endorsee, against M. W. Gary, as endorser, of a paper, of which the following is a copy:

"\$886.

CHARLESTON, S. C., July 31st, 1877.

"On the first of November, 1877, I promise to pay to M. W. Gary, or order, without offset, eight hundred and eighty-six dollars, for value received, with interest from date, interest after maturity at the rate of one per cent. per month, having deposited with M. W. Gary, as collateral security, seven hundred and thirty-five dollars Greenville and Columbia railroad second mortgage coupons, past due. And in case this note shall not be paid when due, I hereby give the said M. W. Gary authority to sell the said security, or any part thereof, for my account, on the

---

April Term, 1882.

---

maturity of this note, or at any time thereafter, at public or private sale, at his discretion, without advertising the same, and to apply so much of the proceeds of said security to the payment of this note, as may be necessary to pay the same, with all interest due thereon, and also the payment of all expenses attending the sale of the said security. If the net proceeds of the said security shall not cover the amount due on this note, I hold myself bound to pay the balance forthwith, after such sale, with interest, at the rate of one per cent. per month.

(Signed) "W. J. MAGRATH,

*"Pres't Greenville and Columbia R. R. Co."*

(Endorsed) "M. W. GARY."

The fundamental and controlling question made by this appeal is, whether the paper sued on is a negotiable instrument? The Circuit judge held that it was not, and the appellant alleges that there was error in so holding. The first part of the paper, down to the first period, is nothing more nor less than a note, with a recital of the fact that certain railroad coupons had been deposited with the payee as collateral security for the payment of the amount which the maker promised to pay. It is an absolute promise to pay a certain sum of money, at a certain time, to a certain person therein named, or his order. There is nothing conditional or uncertain about it, and it therefore comes up, fully, to the definition of a promissory note, (*Story Prom. N.*, § 1, and 1 *Dan. Neg. Inst.*, § 28, *et seq.*) and being payable to the payee or order, and being open—that is, unsealed, it is negotiable.

The only remaining inquiry, so far as this part of the paper is concerned, is whether the additional words, containing a mere recital of the fact that the payment of the sum promised has been secured by certain specified security, deprives it of its character as a negotiable instrument. It will be observed that these additional words constitute no additional agreement, nor do they in any way qualify, or render doubtful or uncertain, the preceding absolute promise to pay. They do not incorporate into the paper any terms which can, by any possibility, destroy or render uncertain any of the essential elements which are necessary to

## Opinion of the Court.

make up a negotiable note. They are a mere recital of a fact which can have no influence upon the promise to pay, and we are unable to see any reason why the addition of such words should affect the negotiability of the instrument. Such, too, seems to be the result of the authorities. *Wise v. Charlton*, 4 *Ad. & E.* 786; *Fancourt v. Thorn*, 9 *Ad. & E. (N. S.)* 312; *Towne v. Rice*, 122 *Mass.* 67.

The next inquiry is whether the remainder of the paper, by which the maker gives to the payee authority to sell the collaterals in case the sum promised is not paid at maturity, and apply the proceeds of such sale to the payment of the amount due as well as to the expenses of such sale, and an obligation to pay whatever balance may be due, after the net proceeds of the sale are so applied, deprives the paper of its negotiability. Here, too, it will be observed that these additional words cannot in any way affect the terms of the original promise, so as to import into it any element of uncertainty, either as to the amount to be paid, the time of payment, the person to whom payment is to be made, or the medium of payment. In fact, these words import nothing more than an agreement which the law would imply from the fact that collaterals had been deposited with the payee to secure the amount promised, and may be regarded as surplusage, except, perhaps, the authority to sell the collaterals "without advertising," and this, so far from clogging, or in any way impeding, the payee in the enforcement of his rights, would have an exactly contrary effect, and would tend to render more certain the payment of the note at maturity, which is one of the things which impart to a negotiable paper its peculiar value. We do not perceive, therefore, how these additional words can deprive the paper in question of its negotiable character.

This view is supported by the weight of authority. In *Story Prom. N.*, § 17 (8th Ed.), it is said: "An instrument in terms and form a negotiable promissory note does not lose that character, because it recites that the maker has deposited collateral security for its payment, which he agrees may be sold in a certain manner specified, and that he would pay the balance." In 1 *Dan. Neg. Inst.*, § 59, that eminent author, while admitting the general rule to be that a negotiable note must be for the pay-

---

April Term, 1882.

---

ment of money only, and "if any other agreement of a different character be engrafted upon it, it becomes a special contract clogged and involved with other matters, and has been deemed to lose thereby its character as a commercial instrument," adds: "But at the present time, we think, that this general rule is subject to the qualification, that if the superadded agreement do not impair the certainty of the promise to pay the certain amount named, but only facilitates the means of its collection, it does not, in any degree, destroy the negotiability of the instrument." And in the succeeding sections he cites the cases in which such superadded agreements, as for example, authority to confess judgment, waiver of stay and exemption laws, or stipulations to pay collection fees, have been held not to impair the negotiability of the paper.

It seems to us, however, that, while agreements authorizing a confession of judgment, or a waiver of stay and exemption laws, do come strictly within the qualification stated, inasmuch as such agreements cannot in any way affect the certainty of the promise to pay, and only facilitate the collection of the amount promised, the same cannot be said of a stipulation to pay collection fees, for that does import into the contract an element of uncertainty as to the amount which the maker promises to pay, and ought, therefore, to deprive the paper of its character as a negotiable instrument. Upon the same principle a power of attorney to sell collaterals may be incorporated in a note without impairing its negotiability, even though it may contain a waiver of the necessity for advertising such sale (as in the case now before the court), because such superadded agreement does not in any way impair the certainty of the amount to be paid, and only facilitates its collection.

In *Zimmerman v. Anderson*, 67 Pa. St. 421, a paper containing a promise to pay a certain sum of money, at a specified time, to a person therein named or order, to which was added these words: "Waiving the right of appeal and of all valuation, appraisement, stay and exemption laws," was held to be negotiable. Read, J., in answer to the argument that these additional words rendered the paper unnegotiable, said: "They do not contain any condition or contingency, but after the note



## Opinion of the Court.

falls due, and is unpaid, and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it. ' Instead of clogging its negotiability, it adds to it, and gives additional value to the note.' These remarks apply with equal force to the waiver of the necessity for advertising the sale of the collaterals, in the case now before the court.

To the same effect are the remarks of Sharswood, J., in *Woods v. North*, 84 Pa. St. 407 (24 Am. Rep. 201), where, while holding that the insertion of an agreement to pay collection fees, if not paid when due, rendered the note unnegotiable because it imported into the contract an element of uncertainty as to the amount to be paid, said: "Interest and costs of protest after non-payment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not affect its negotiability. Neither does a clause waiving exemption, for that in no way touches the simplicity and certainty of the paper." See also *Arnold v. Rock River Valley Union R. R. Co.*, 5 Duer 207; *Osborn v. Hawley*, 19 Ohio 130.

The cases of *Wallace v. Dyson*, 1 Spears 127, in which the paper sued on was an obligation for the hire of slaves, and contained, also, a stipulation "to furnish clothing, pay taxes, not to pay physicians' bills," &c.; *Barnes v. Gormam*, 9 Rich. 297, in which the paper was of like character; and *Read v. McNulty*, 12 Rich. 445, in which the promise was to pay so much money "with exchange on New York," are clearly distinguishable from the case now under consideration; for in each of those cases the superadded agreement imported an element of uncertainty into the contract as to the amount to be paid, while here, as we have seen, the additional words relied upon do not, in any way, affect any of the certainties required in a negotiable note. We are of opinion, therefore, that the Circuit judge erred in charging the jury that the paper sued on was not a negotiable note.

Under this view of the case the other questions presented by the grounds of appeal cannot fairly arise, and need not, therefore, be considered. The question as to the legal effect of an endorsement in blank by the payee of a negotiable note, and whether it is competent by parol evidence to vary the contract which the law implies from such endorsement, though discussed

---

April Term, 1882.

---

in the argument here, does not seem to be raised by any of the grounds of appeal, and, therefore, is not properly before us. The Circuit judge having held that the paper in question was not negotiable, such a question was never reached in the Circuit Court, and, consequently, there was no ruling upon it from which there could be an appeal. But even if it had been raised, we suppose the law upon that subject is too well settled to require any extended notice at our hands; that an endorsement, in blank, of a negotiable note renders the endorser liable to every subsequent holder, and, in the absence of allegation and proof of fraud or mistake, such liability cannot be discharged or limited by parol evidence.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

---

EX PARTE CAROLINA NATIONAL BANK.

GIBBES v. GREENVILLE AND COLUMBIA R. R. CO.

STATE, *EX RELATIONE* ATTORNEY GENERAL v. SAME.

1. A finding of fact by the Circuit judge reversed because opposed to the preponderance of the evidence.
2. Money, necessary for the proper and successful management of a railroad, borrowed by the officers of the road while acting as receivers under an order of court, giving them power "to continue in the possession and management of the property," should be repaid out of the fund in court, realized from the income of the road while in the receiver's hands.
3. Such loan having been secured by a deposit of bonds belonging to the railroad company, which bonds were afterwards sold to the credit of the loan, and the payee, under a call for creditors, having presented his petition for the payment of the balance out of the receiver's fund, other creditors could not assert, by way of counter-claim to this petition, the right to have the hypothecated bonds surrendered to the court or their value accounted for.
4. *Fifty-four Bond Case*, 15 S. C. 304, and *Ex parte Brown and Wife*, Id. 531, recognized and followed.

---

Before FRASER, J., Richland, December, 1881.

T

---

Circuit Decree.

---

The facts necessary to a proper understanding of this case will be found stated in the opinion. The orders appointing receivers need not be given, as they will be found in the *Fifty-four Bond Case*, 15 S. C. 304, in *Ex parte Benson & Co.*, ante 38, and in other cases.

The Circuit decree, omitting its statement, was as follows:

The first question is as to the validity of petitioner's claim. It is not necessary for me to state again my reasons for holding that there is nothing in the language of Judge Melton's order, or of any ruling of the Supreme Court, to warrant the inference which has been pressed upon me, that the president and board of directors of the Greenville and Columbia Railroad Company had, under that order, the power to conduct and carry on the business of the company "in like manner as they have heretofore done." The words in the order are "under the order and subject to this court." These are words of large signification, but they convey the powers and prescribe the duties of a railway receiver, and no more. The business of the company was that of a common carrier of freight and passengers. It was only a privilege to make contracts for the loan of money. Whatever was necessary for the business of the company was within the range of their powers and duties. "All outlays made by the receivers in good faith in the ordinary course, with a view to advance and promote the business of the road and to render it profitable and successful, are fairly within the line of discretion, which is necessarily allowed to a receiver entrusted with the management of a railroad in his hands." *Cowdrey v. The R. R. Co.*, 1 Woods 331.

If it were clearly shown that money was borrowed to carry on the operations of the road as a common carrier, I would not say that it ought not to be repaid out of the fund. Before this is done, however, the court ought to have proper evidence that it was necessary for this purpose, and if not, parties must look to the personal responsibility of the receiver. If money-lenders are not satisfied with this personal responsibility, it is an easy matter to wait until an order of the court can be obtained. All other trustees borrow money for the use of the trust-estate in the absence of express power, only on their own personal respon-

---

April Term, 1882.

---

sibility, and can be re-imbursed after it has been shown to have been properly expended. I see no reason to apply a different rule to receivers.

I cannot be controlled in this matter by the testimony of a very intelligent and experienced witness who says that all the money borrowed was "necessary." The facts do not bear him out. We find these receivers, in disregard to orders of the court, for four years paying interest on the whole bonded debt—buying and selling bonds of this company—of the Laurens Railroad Company, of the Blue Ridge Railroad Company, making an extension to connect with the Air Line railway, paying to a debt of T. Bush, for which they were in no way responsible, about \$15,000, and on the debt of H. H. Kimpton, an unsecured debt contracted before the receivership, over \$27,000.

The order of Judge Melton gave to the receivers no power to borrow money, so that it must be repaid as a mere matter of contract, and I do not think it was necessary or proper to do so in this case. If the petitioner dealt with the receivers with a view to their character as receivers and not as officers of the company, then petitioner must have known that he was dealing with the funds, which were under the control of this court, and which ought not to have been purchased or sold without its sanction. I doubt if petitioner ever looked to the receiver's fund for payment, much less to a claim to be superior to bondholders who held liens. I do not think, therefore, that there is any hardship to petitioner in this view, and the claim ought not to be allowed.

With regard to the counter-claim, I have nothing to add to the views expressed in a judgment to be filed at the same time with this in *Ex parte George W. Williams, Treasurer* [see next case, *post*]. If it were necessary to decide the question, I would be inclined to the opinion that such a counter-claim could not be set up in this form of proceeding. I do not see how a counter-claim, to be enforced against the person of the petitioner, can be set up against a mere application to be paid out of a fund in court. In the view of this case, which I have presented in *Ex parte Williams*, I do not think that there is any ground for this counter-claim in any form of action, and it ought not to be

---

Statement of the Case.

---

allowed. There is no theory of which I am aware on which it could be allowed which would not re-open all the issues between the bondholders in this case, and, perhaps, lead to new and unexpected litigation.

It is, therefore, ordered and adjudged, that the petition and counter-claim be dismissed.

From this decree both parties appealed. Petitioner's exceptions were as follows:

1. Because his Honor erred in holding that the order of Judge Melton conveyed the powers and prescribed the duties of a railway receiver, and no more; whereas his Honor should have held that the powers conveyed by said order were more extended, and the duties imposed thereby more general than those usually conferred and imposed upon railway receivers.

2. Because his Honor erred in holding that the loan set forth in the said petition was unnecessary, and in this connection disregarded the uncontradicted testimony of the witness Manson, who proved that all loans made were necessary to the proper conduct and management of the business of the road.

3. Because his Honor erred in deciding that the order of Judge Melton conferred upon the president and directors, acting as receivers, no power to borrow money.

4. Because his Honor erred in not allowing the claim, and in ordering and adjudging that the petition be dismissed.

The exceptions of Clyde *et al.* were as follows:

1. That his Honor having decided that the receiver had no right or authority to borrow money, it followed, necessarily, that the receiver had no right or authority to pledge the assets of the road for money so borrowed, and his Honor should have held that the assets so pledged were illegally pledged.

2. That his Honor, having held that if the petitioner dealt with the receiver, "he must have known that he was dealing with the funds which were under the control of this court, and which ought not to have been purchased and sold without its sanction," should have further held that the funds or assets acquired by the petitioner, without the sanction of the court,

---

April Term, 1882.

---

were illegally acquired, and that petitioner thereby became liable to restore them, or to account to the court for their value.

3. That it was proved that the president of the Carolina Bank was a director of the Greenville and Columbia Railroad Company, and one of the receivers appointed by the order of Judge Melton, and was annually re-elected director until his death, in 1880, and that his Honor should have held that the bank had full notice that it was dealing with the receiver, and obtaining assets which were under the control of the court.

4. That his Honor erred in holding that the doctrine of *lis pendens* applied to this case. That the question is not whether these particular bonds pledged carried notice with them, but is whether one dealing with a trustee, a receiver, and acquiring from him trust property, which he had no right to part with, except by order of court, can hold such property as against the *cestui que trust*.

5. That his Honor having held that the receiver had no authority to borrow the money, and that the petitioner, dealing with the receiver, was dealing with funds which were under the control of the court, and could not be purchased or sold without its sanction, by the dismissal of the counter-claim, leaves the petitioner in possession of assets illegally acquired from a trustee; and to the extent of the amount realized by the sale of the bonds, the petitioner profits by his illegal action, and the *cestui que trust* loses.

6. That the first part of the decree declares the transaction illegal, while the latter part gives to petitioner good title to the property illegally acquired; whereas it is respectfully submitted that petitioner should have been decreed to account for the assets or their value.

*Messrs. Melton, Clark & Muller, for petitioner.*

*Mr. James Conner, contra.*

November 27th, 1882. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON: For the proper understanding of the questions involved in this case, it will only be

---

Opinion of the Court.

---

necessary to state the facts connected with the claim of the petitioner, the Carolina National Bank. In July, 1872, by an order of the court in the above causes, the property of the Greenville and Columbia Railroad Company was placed in the possession and under the management of the president and directors of said company, who were thereby directed to conduct and carry on the business of said company, subject to the orders of the court. It has since been decided by this court that this order constituted the president and directors receivers. Under this order, the road was operated from its date in July, 1872, to November, 1878. During this time the president and directors borrowed certain moneys from the petitioner which were used in the conduct and management of the business of the company.

The amount thus borrowed, after several renewals and payments, was finally reduced, on April 13th, 1877, to \$20,000, evidenced by one note for that sum, which was renewed from that date to July 13th, 1878, the date of the last renewal. To secure the payment of this money, the president and directors deposited with the petitioner two hundred and sixty-eight bonds of the said Greenville and Columbia Railroad Company for \$500 each. These bonds were sold by the petitioner on March 13th, 1880, for \$13,400, the proceeds being applied to the note. The balance the petitioner seeks in this proceeding to establish against the fund in court, arising from the annual income of the road while in the hands of the receiver, or from the proceeds of the sale thereof.

Clyde, Logan and Bryan, who were holders of a large amount of the second mortgage bonds of the company, and upon whom the petition was served, answered, resisting the petition upon the ground that the receivers had no right to borrow money, nor the president to make the note in question. They also asserted the right by way of counter-claim, to have the bonds hypothecated to the petitioner surrendered to the court, or their value accounted for by the petitioner for the benefit of the second mortgage bondholders.

To this counter-claim the petitioner replied, and the case came to a hearing before Judge Fraser, who dismissed both the petition and the counter-claim. From this decree, both the petitioner

---

April Term, 1882.

---

and the defendants, Clyde, Logan and Bryan, have appealed. The appeal of the petitioner involves, mainly, a question of fact, to wit, whether the loan contracted by the president and directors, and which was the basis of petitioner's claim, was necessary to the proper conduct of the road under their charge as receivers.

Without attempting to define the exact powers with which the receivers in the case were invested by the order of June, 1872, it is sufficient to say, in the language of *Cowdrey v. The Railroad Company*, 1 Wood 336, and quoted in the decree of Judge Fraser, "that all outlays made by the receivers in good faith in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are purely within the line of discretion which is necessarily allowed a receiver entrusted with the management of a railroad in his hands." This, no doubt, is the general rule, and no one who is at all familiar with the history of the Greenville Railroad since June, 1872, when the order of Judge Melton was passed, by which the president and directors were converted into receivers, and the various decisions of this court on the transactions of these receivers and the liability of the funds in their hands to claimants, rendered since 1872, can fail to see that this general rule has not been, in the least, narrowed or contracted in its application to their management. On the contrary, if not enlarged, it has been enforced with a most liberal construction. This was, no doubt, due to the anomalous character of the order and the necessities which prompted it, and for the accomplishment of which, no doubt, it was passed. See *Fifty-four Bond Case*, 15 S. C. 304; *Ex parte Brown and Wife*, *Ib.* 531; also the recent case of *Ex parte Benson & Co.*, *ante* 38.

While this court clearly held in the two former cases, that this order constituted the president and directors receivers, yet a distinction was drawn, especially in the case of *Ex parte Brown*, p. 531, by Judge Fraser, as to their powers, and the powers of General Conner, who was subsequently distinctly and in terms appointed receiver, displacing the president and directors. This distinction grew out of the different language employed in the two appointments. In the first, the president and directors were



## Opinion of the Court.

ordered to continue in the possession and management of the property, and to make report, that proper orders may be made. Under the latter, General Conner was appointed receiver *eo nomine*, "and he was required to demand and receive possession of all of the property of the company, to keep and preserve the same subject to the control, order and direction of the court, with power and authority to manage and operate the said railroad, to receive and disburse the income, the disbursements to be confined to the expense of running the road."

Whatever may be the law applicable to receivers generally, we think that the case of *Ex parte Brown and Wife*, and the *Fifty-four Bond Case*, have modified that law as to these receivers; or, in other words, the president and directors were appointed under a peculiar order, which order has been construed by this court in the two cases above referred to, and the law in reference to them is found in said cases. Under this view, and governed by these cases, we repeat that the only question before Judge Fraser was whether the borrowing of the money was necessary to the proper and successful management of the road. Judge Fraser seems so to have understood the case, where he says: "If it were clearly shown that money was borrowed, to carry on the road as a common carrier, I would not say that it ought not to be repaid out of the fund. Before this can be done, however, the court ought to have proper evidence that it was necessary for this purpose, and if not, the parties must look to the personal responsibility of the receiver."

In applying this principle, we think that Judge Fraser erred in his finding when he declined to be controlled by the testimony of Mr. Manson on the subject of the necessity of this loan. This witness had been in charge of the accounting and treasury department of the company since 1872; was treasurer from 1875 to 1878, when General Conner was appointed receiver; was entirely familiar with its financial condition; was a very intelligent and experienced witness, and was the only witness on this subject. He testified that when money was borrowed, there was necessity for borrowing, and this he states without qualification, and the explanations which he gave as to the condition of the road seem to sustain him.

---

April Term, 1882.

---

The president and directors were receivers at the instance of the bondholders. These bondholders stood by and suffered this road to be operated under the order of June, 1872, for over six years, with no intimation that the rigid doctrine, now contended for as to the duties and powers of receivers, should be applied to the case, and we think it too late, now, for such claim. The road certainly received the benefit of this money, and it would be highly inequitable to throw the lender upon the general responsibility of the receiver—inequitable both to the lender and to the receivers, and this should not be done unless imperatively demanded by the legal principles involved. The manifest preponderance of the testimony, in our judgment, is against the finding of fact by the Circuit judge, as to the necessity of the loan in question by the petitioner to the receivers, and this finding is therefore reversed.

As to the counter-claim, we concur with the Circuit judge in dismissing it. "A counter-claim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action and arising out of one of the two following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. 2. In an action arising in contract, any other cause of action arising also on contract, and existing at the commencement of the action." *Code*, § 173.

Tested by this provision of the code, we do not find a single element of a counter-claim in the matter attempted to be set up here by Clyde, Logan and Bryan. In the first place, no separate judgment could be rendered in their favor against the petitioner for the bonds in question, even if the petitioner could be held liable for these bonds. If these bonds were, in fact, trust property, which the petitioner improperly obtained from the trustee, he might, by a proper proceeding, be made to account to that estate for their value, subject to distribution under the order of the court among the *cestuis que trust*; but we do not see how, under this petition, Clyde, Logan and Bryan could obtain a judgment in their behalf for the value of these bonds. In fact, they do not ask this; they claim that the bonds in question

---

Opinion of the Court.

---

shall be delivered to the master, or their value paid to the master. This at once shows that the matter set up is not a counter-claim, and this is further evident from the fact that the claim does not fall under either of the two classes mentioned in the code above as constituting a counter-claim.

It is neither a claim arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim; nor does it arise on contract existing in favor of Clyde, Logan and Bryan at the commencement of the action. If it is a valid claim at all, it arises from an equity principle established and to be enforced through the equity jurisdiction of the court. Its foundation, if any, is that wholesome equity doctrine which holds a party responsible for trust property purchased with a knowledge of the trust and in violation of the rights of the *cestuis que trust*. Here a petition was filed, under a call for creditors, to establish a note against an insolvent company, so as to receive payment out of the funds in court; another creditor resists this debt and sets up, by way of counter-claim, the fact that the petitioner has diverted a portion of the trust fund from its proper destination, and demands that he shall return this property to the trust-estate. If this demand is a just one, and well founded, there is a remedy; but it would be stretching the doctrine of counter-claim beyond all precedent to permit this question to be adjudged and determined under such a proceeding.

We think that the claim of the petitioner should be established against the income fund in the hands of the court, and that the counter-claim should be dismissed. It is the judgment of this court that the decree below be affirmed as to the counter-claim, and reversed as to the claim of the petitioner, and that the case be remanded to be enforced according to the principles herein announced.

---

April Term, 1882.

---

## EX PARTE WILLIAMS.

GIBBES v. GREENVILLE AND COLUMBIA R. R. COMPANY.

STATE, *EX RELATIONE* ATTORNEY-GENERAL v. SAME.

A purchaser, on new and ample consideration, of bonds constituting a part of the assets of a railroad company in the hands of a receiver, without knowledge or notice of the trust, is not liable to the creditors of the corporation for the value of the bonds.

---

Before FRASER, J., Richland, December, 1881.

George W. Williams, as treasurer of a syndicate formed to assist the South Carolina Railroad Company, received from that company as collateral security for advances made and to be made, certain securities, including two notes given by the Greenville and Columbia Railroad Company to the South Carolina Railroad Company, secured by a deposit of mortgage bonds of the former company, which bonds passed to Williams, treasurer, with the notes they were intended to secure. One of these notes was for \$51,432, secured by 103 Greenville and Columbia Railroad second mortgage bonds, of \$500 each, dated December 30th, 1876; and the other of the same date, was for \$135,818.74, secured by 543 like bonds.

All of these bonds were, after the maturity of the notes, sold by the syndicate, and G. W. Williams, as their treasurer, presented two petitions in this cause, asking in each for the payment of the balance due on the notes, respectively, out of the receiver's fund, inasmuch as the notes were given for the necessary expenses of the road while in the hands of the receivers appointed by Judge Melton's order of June 18th, 1872. The petition as to the note for \$51,432, was disposed of by the opinion of this court refusing it, to be found reported as *Ex parte Williams*, 17 S. C. 396.

This case is the petition as to the note for \$135,818.74, which

---

Circuit Decree.

---

was also refused by the Circuit decree in this cause, and from such refusal no appeal was taken. But in answer to this petition, Clyde *et al.*, holders of second mortgage bonds (and who as such would receive all the funds in the cause not absorbed by claims of higher rank) interposed as a counter-claim that the pledge of the bonds to the two notes above described was illegal, and that G. W. Williams, treasurer, should be decreed to account for the said collaterals or their value.

Judge Fraser also dismissed the counter-claim. So much of his decree as relates to this counter-claim was as follows:

The only question then left for my consideration is that of the counter-claim set up by W. P. Clyde and others, that the petitioner, George W. Williams, treasurer, should be held to account for the 543 and 103 second mortgage bonds above referred to, on the ground, as I understand it, that they were assets in the hands of the receivers, who sold them without authority, and that of this the petitioner was bound to take notice, so that in his hands the bonds were effected with the trusts under which the receivers held them. The counter-claim is filed by William P. Clyde, Thomas M. Logan and Joseph Bryan, on behalf of themselves and other holders of second mortgage bonds, who claim to be entitled to the net proceeds of the sale and income in the hands of the master. These are the same parties who bought these bonds from the petitioner.

The first provision of Judge Melton's order was one which enjoined all creditors from commencing or prosecuting any suits against the corporation, or enforcing judgments already obtained by execution against the property. The second provision was one which put the property in the hands of the president and directors, and substituted the "order" and direction "of the court" for the will of the stockholders. The corporation, whose will is expressed only by the stockholders, were displaced by the order, and President Magrath, in his annual report for the fiscal year ending December 31st, 1872, says: "Under the operation of the orders growing out of these proceedings no suits could be instituted, and no payments made, except for the absolutely necessary wants of the road." If this clear and correct view of their powers and duties had not been lost sight of by the

---

April Term, 1882.

---

president and directors, many of the embarrassing questions which have arisen in this administration would have been avoided.

If any other orders of the court were necessary before they assumed any conduct of the business, then not one train could have moved from the depot, as no order was made except the one referred to, "to continue to conduct and carry on the business of the said company." The true conception of the scope of this order, in my view, is that every act of the president and directors was subject to the supervision and control of the court, and that to them, as to all receivers, necessary expenditures for labor and material would, as a matter of course, be allowed; but when they went beyond this to make permanent improvements and changes, speculative contracts for rebates, and the purchase and sale of bonds, they, and all who dealt with them, should have understood that their contracts might not meet the approval of the court. I find neither in the order itself or in any decision or *dictum* of the court any warrant for that unlimited power claimed in some quarters, and expressed by the words "in like manner as they have heretofore done."

We must, therefore, look to other considerations to determine whether this is a valid counter-claim. The objection to the mode in which this counter-claim is presented has been waived at the hearing, and we must look to its merits. The peculiar order of Judge Melton was perhaps the best which could have been made for the interest of all parties in the abnormal condition of the country at the time it was made. Perhaps it was never intended to interfere with the corporate existence of the railroad company, and there is nothing in the order which does (see *High on Receivers*, § 397, note 2); and it does not follow that third parties who dealt with the president and directors in a manner lawful with them as officers, and unlawful as receivers, necessarily knew that they dealt in the latter capacity.

To make the petitioner liable to this counter-claim, there must have been something in this transaction which affected him with notice that he was dealing with trust funds. If any third person, entirely unconnected with the company or its business, had been appointed receiver, the mere fact of dealing in this way

## Circuit Decree.

might have been sufficient, at least, to put a prudent man on his guard. It does not strike me that the same conclusion would follow here. There is nothing on these bonds which show that they were a part of the assets in the hands of the receivers, either as a part of the *corpus* or as being an investment temporarily made of the income, and there is no evidence to show that they were not purchased with money, which the evidence shows was from time to time borrowed by the president and directors.

If the old doctrine of *lis pendens* is any longer applicable, except as to the specific cases prescribed in the code, it will be found that it was only applicable to specific property, which "must be so pointed out by the proceeding as to warn the whole world that they meddle at their peril." See *Lewis v. Mew*, 1 *Strobh. Eq.* 183; *Edmonds v. Crenshaw*, 1 *McC. Ch.* 261. Cash and negotiable paper not due are not affected in the absence of actual notice. *Wade Law of Notice*, §§ 371, 372. I do not see why corporation bonds can be subject to a different rule. "There must be something in the pleadings or in the published notice at the time of the purchase to direct the purchaser's attention to the identical thing, which is the subject of the litigation, the notice being purely constructive of the facts contained in the bill and nothing more." *Wade on Notice*, § 351.

The purchase of these bonds by the South Carolina Railroad Company to secure an antecedent debt may not have had a sufficient consideration to support it, but the purchase by George W. Williams, as treasurer of the syndicate, from the South Carolina Railroad Company, was upon a new and ample consideration, the loan of money or credit, which was sufficient even if the original purchase from the receivers had been tainted with a want of proper consideration.

There is, however, another feature of this case which makes it a very peculiar one. In order to entitle litigants to the protection afforded by the constructive notice of the *lis pendens*, there must be diligence in the prosecution of the suit. I have found no case where the parties lost that protection unless there was laches in reviving a suit which had abated. 2 *Lead. Cas. Eq.* 125, 126, 127; but I see no good reason why it should not be lost by other conduct of the parties. In this case the order

---

April Term, 1882.

---

of Judge Melton was made in 1872, on June 17th, and for over six years, until 1878, November 23d, not one single report was made or called for from the custodians of the property appointed by the court. In the meantime, while enjoying the protection of the court from suits and executions, the lien creditors, including the holders of these second mortgage bonds, received their interest from the surplus income and from borrowed money from July, 1873, to July, 1877. Thus every holder of these bonds was a party to this infringement of the order of the court, and all who purchased these bonds, or any of them, are subject to such equities as existed against these bonds in consequence of these transactions.

I think those who then held these bonds would be estopped from claiming, in the face of these proceedings (for they were all called in as parties to the suit), the protection of the *lis pendens* as amongst themselves, or in transactions with others who dealt in these bonds, on the faith that they were on the market, free from all entanglements, which might impose on them the character of trust funds, because they may have been at one time in the hands of those who, though officers of the company, were also receivers appointed by the court. I do not see how these receivers had any right to make a payment of interest on second mortgage bonds, to which the blue bonds and the guaranteed bonds were prior, or even the interest on these latter bonds themselves, under the order of Judge Melton.

As to all creditors there was an exhaustive order to prove their claims before the referee, and President Magrath was right when he said to the stockholders that there could be "no payments made" under this order; and when subsequently these lien creditors did accept for four years successively payment of their interest coupons, they opened the way to unsecured creditors to accept, I think with safety, any money or security they could obtain. Clyde and others, who now hold these bonds, I think ought to be bound as privies. 2 *Lead. Cas. Eq.* p. 653. I find no evidence to contradict the sworn statement of George W. Williams that he never qualified or acted as a director of the Greenville and Columbia Railroad Company, and if he was ever an acting director, I do not see how he can be made to answer to



---

Opinion of the Court.

---

parties or their privies for acting without the authority of the court, who, to say the least, were equally at fault. The rights of parties who were not admitted to this premature division of assets, stand on a different footing, and some of them have been recognized by the court. The counter-claim cannot therefore be allowed.

It is therefore ordered and adjudged that the petition be dismissed, each party paying his own costs.

Clyde *et al.* appealed from so much of this decree as dismissed their counter-claim.

*Mr. James Conner* for appellants.

*Messrs. Buist & Buist, Lord & Inglesby, Simonton & Barker,*  
contra.

November 27th, 1882. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. In this case the only question involved is the question of the counter-claim set up in the answer of the defendants. This claim was dismissed by the Circuit judge.

The question involved in the appeal is the same as that raised and decided in the recent case of *Ex parte The Carolina National Bank, In re The Attorney-General et al. v. The Greenville and Columbia Railroad Co.*, ante 289. It is true that, in this case, the objection to the mode in which the counter-claim was presented was waived at the hearing, and the case was heard upon its merits.

The decree of the Circuit judge is based upon the fact that there was not sufficient evidence before him that the petitioner had notice that he was dealing with trust funds when he became possessed of the funds in question. We think this was the turning-point in the case, and we find nothing in the testimony which would authorize this court to overrule the Circuit judge in his conclusions upon this subject. The petitioner never qualified or acted as a director of the Greenville and Columbia Railroad. He purchased these bonds as treasurer of the syndi-

---

April Term, 1882.

---

cate from the South Carolina Railroad Company upon a new and ample consideration. There was nothing in the bonds themselves which advertised parties that they constituted part of the assets in the hands of the receiver. And finally, there was no sufficient testimony to bring the case under the operation of the equity doctrine which holds parties responsible for trust funds or property obtained from a trustee with a knowledge of the trust. The counter-claim can have no standing even as a cause of action except upon this doctrine, and the important fact of knowledge by the petitioner of the trust character of the bonds being absent, there is nothing through which this doctrine can be applied and enforced.

It is, therefore, the judgment of this court that the judgment of the Circuit Court be affirmed.

---

TRUMBO v. FINLEY.

1. A complaint by a common informer, alleging the winning of money by defendants from one A. at a game of faro, on or about a certain day named, states no cause of action and was, therefore, properly dismissed on demurrer, as the only right of action to an informer in such case exists under a statute which authorizes a recovery where the money was won at any time or sitting; that is, at any one time or sitting. To constitute a cause of action under this statute, the money must have been won at one time or at one sitting.
2. As the complaint stated no cause of action, a demurrer was proper; it was not necessary for defendants to move that plaintiff be required to make his averments more definite and certain.
3. In the matter of permitting a plaintiff to amend his complaint after demurrer, much must be left to the discretion of the Circuit judge, and the exercise of such discretion, as a rule, will not be disturbed, unless it deprives a party of a substantial legal right.
4. Upon oral demurrer interposed at the trial in this case, the complaint was properly held not to state facts sufficient to constitute a cause of action, and the presiding judge refused to permit plaintiff to amend by stating a wholly different and new cause of action. *Held*, that this order of refusal should not be disturbed.

---

Before KERSHAW, J., Charleston, June, 1881.

---

Circuit Decree.

---

The opinion states the case. The order of the Circuit judge was as follows:

I think the complaint is defective. The authority of Sir William Blackstone, construing the statute from which this is taken almost *verbatim*, indicates what a "time" or "sitting" is. He defines both of those terms as not referring to a day or a period of time, in the ordinary use of that term, but to a certain specific point of time—to an occurrence more than to a time. I think that is a reasonable and proper construction of this act. I don't think it has reference to the day, because there might be many of those transactions occurring in a day. The rule is, that wherever an action is brought for a penalty under the statute, that the statute must be strictly construed, and that the strict rules of pleading adopted on the criminal side of the court should be applied wherever it is sought to enforce penal statutes on the civil side of the court.

I confess to some embarrassment growing out of the circumstance that we are now proceeding under a code which allows an almost unlimited right of amendment, and in all other actions I should suppose the court could be extremely liberal in trying to lick into shape the proceedings before the court in the interest of justice. But however offensive to our ideas of morals gambling may be (although good people are divided on that point), and however censurable it may be that men should carry on a business to tempt young men in fiduciary positions to violate their trusts, and in many cases perhaps with the full knowledge all the time that their victims are plundering their employers, yet the plaintiff here has no right to recover one cent from these defendants, except under strict compliance with the terms of the law which makes them liable.

While I would most willingly give the plaintiff a status in this court, especially as a great deal of expense has been incurred, and these circumstances make me very reluctant to dismiss this complaint without ordering an amendment, yet it seems to me that the answer to that has been properly made by the defendants. This is a technical action, and if a party come into court to enforce a penalty by a technical action, not one founded on contract, but upon the strict letter of the law, and misconceive

---

April Term, 1882.

---

the mode of presenting his case, I think the court should not hesitate upon general principles. If an exception could be made, I would most willingly make an exception in this case. I would be glad to see the case taken up to the Supreme Court.

It is ordered that the complaint herein be dismissed, because it does not state facts sufficient to constitute a cause of action. Motion of plaintiff to amend refused.

*Messrs. T. M. Mordecai, B. H. Rutledge*, for appellants.

*Messrs. A. D. Cohen, Simonton & Barker*, contra.

November 29th, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. This was a *qui tam* action, brought by Augustus S. Trumbo, the plaintiff, against Thomas Finley and William K. Brown, the defendants, to recover \$75,000, being treble damages for \$25,000, alleged to have been won by them at a game of faro, from one Bentham R. Caldwell "on or about" certain days named in the different counts. The complaint contained one hundred and ten causes of action, of which the first was as follows:

"For a first cause of action: That on or about the 24th day of July, 1879, in the city of Charleston, within the limits of the county and State aforesaid, one Bentham R. Caldwell did, by playing at faro, lose to Thomas Finley and William K. Brown, the defendants herein, the sum of fifteen hundred dollars, or thereabouts, and did then and there pay over and deliver said sum of money to them the said Thomas Finley and William K. Brown. That the said Bentham R. Caldwell, who, on or about the date aforesaid, at the place aforesaid, and at the game aforesaid, did lose said money, and pay over and deliver said sum of money or thereabouts, to them the said Thomas Finley and William K. Brown, has not within three months then next ensuing from said date, really and *bona fide* and without covin or collusion, sued for and with effect prosecuted for the said sum of money or thereabouts by him so lost as aforesaid, and the plaintiff herein, Augustus S. Trumbo, doth sue the said defend-

---

Opinion of the Court.

---

ants, Thomas Finley and William K. Brown, for treble the value thereof, to wit, the sum of forty-five hundred dollars, or thereabouts, and the costs herein, the one moiety thereof to the use of him the said Augustus S. Trumbo, and the other moiety to the use of the poor of Charleston county, in the said State; and for said sum of forty-five hundred dollars he doth pray judgment against the said defendants, in accordance with the provisions of the 79th chapter of the Revised Statutes of the State of South Carolina."

The other causes of action were similar to the above, except that the dates and amounts were different, specific amounts being charged as having been lost "on or about" a certain specified day, each amount exceeding \$100. With the exception of the days and amounts, the words were identical. The dates, respectively, are from the said July 24th, 1878, to January 1st, 1879. The answer of the defendants was a general denial of each and every cause of action.

The case came on for trial before Judge Kershaw. After the case was opened and before the testimony was offered, a motion was made to dismiss the complaint on verbal demurrer, that the complaint did not state facts sufficient to constitute a cause of action. The defendants argued that the complaint should have alleged each loss to have been "at one time or sitting," and that it did not otherwise sufficiently allege the offense in accordance with the statute. The plaintiff replied that the allegations of the complaint were sufficient and a compliance with the statute, and that the insertion of the words "at one time or sitting," was not only unnecessary, but would have been improper, and asked the court, if it should hold otherwise, for leave to amend, by inserting in each cause of action such words as the court should deem necessary and proper. Judge Kershaw granted the motion and dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and also refused the motion of the plaintiff to amend. From this order the plaintiff appeals to this court upon the following exceptions:

1. Because his Honor erred in deciding that the complaint

---

April Term, 1882.

---

was insufficient in this, that it failed to contain the allegation that each loss was sustained "at one time or sitting."

2. Because under the statute in question as now of force in South Carolina, the allegations of the complaint are an adequate statement of the cause of action under said statute, whether tested by the principles of the pleadings and practice which formerly prevailed in this State, or by those which obtain under the present system of the code, and that under either system the insertion of the words "at one time or sitting" would be objectionable, and that the allegations of the complaint are in accordance with the statute.

3. Because even if it should be held that to constitute the cause of action contemplated by the statute, the money must be lost "at one time or sitting," this is a matter of proof on the trial, and not of essential allegation in the complaint. The practice, even in case of an indictment (where the charge is in the language of the act creating the penalty declared for, or in words of equivalent import), being for the defendant to move to that effect, where circumstances render it necessary for his defense, that the offense be more specifically stated; and especially is that the case in practice under the code, where the court, on motion of the adverse party, may require the pleadings to be made more definite and certain.

4. Because his Honor erred in deciding that civil actions under a penal statute are to be governed by the technical rules of criminal pleading, even under the old or former system of pleading and practice; and under the code such rule has no application whatever, and that this action is a civil action under the code, and subject to all the rules of practice and pleading existing thereunder.

5. Because if the words "at any one time or sitting," or any other words, be held a necessary allegation of the complaint, the plaintiff ought to have been directed and allowed to amend, as the law requires, and that his Honor erred in refusing the motion, especially as this is a civil action under the code.

This is a novel case. We are not aware that one like it has ever arisen in the State before. Certainly none such was brought

## Opinion of the Court.

to our attention by the exhaustive argument made here. The statute under which the action is brought is as follows :

"SEC. 6. Any person or persons whatsoever, who shall at any time or sitting, by playing at cards, dice-table, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole, the sum or value of fifty dollars, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying or delivering the same shall be at liberty, within three months then next ensuing, to sue for and recover the money or goods so lost and paid or delivered, or any part thereof, from the respective winner or winners thereof, with costs of suit, by action to be prosecuted in any court of competent jurisdiction.

"SEC. 7. In case the person or persons who shall lose such money or other thing as aforesaid, shall not, within the time aforesaid, really and *bona fide*, and without covin or collusion, sue and with effect prosecute for the money or other thing so by him or them lost, and paid and delivered as aforesaid, it shall and may be lawful to and for any person or persons, by any such action or suits as aforesaid, to sue for and recover the same, and treble the value thereof, with costs of suit, against such winner or winners as aforesaid ; the one moiety thereof to the use of the person or persons that will sue for the same, and the other moiety to the use of the poor of the county where the offense shall have been committed." *Gen. Stat. of 1872*, 407.

The object of the statute was manifestly to punish excessive gaming. We regard the important words "at any time or sitting" as only another way of saying "at any one time or sitting." It is true the word "any" is indefinite as to the particular thing referred to, but it is singular, and in connection with a name singular means one of the particular things indicated. In the statute it qualifies both "time" and "sitting," and is equivalent to the expression "at any one time or sitting."

It seems to us that the statute 9 *Anne, ch. XIV.*, from which our act was taken (although it was not all re-enacted), received the proper construction in the case of *Bones v. Booth*, 2 *W. Bl.* 1227. That was not, as this, an action *qui tam* by a stranger

---

April Term, 1882.

---

to recover the penalty, but an action by the loser himself to recover back fourteen guineas lost at gaming. The play was at the West India Coffee House in Bristol. They played at "All Fours" for two guineas a game from Monday evening to Tuesday evening, without interruption, except for an hour or two at dinner; but the plaintiff and defendant never parted company. Booth then owned on Tuesday evening that he had won seventeen guineas. It was insisted at the trial that this was not won at any one sitting so as to fall within the statute, because the dinner had intervened, but the judge thought otherwise. However, the jury found for the defendant, and the court ordered a new trial. Justice Blackstone said: "The statute makes the winning of £10, at one time or sitting, a nullity; and, therefore, gives the loser an action to recover back what still properly continues to be his own money. To lose £10 at one time is to lose it by a single stake or bet. To lose at one sitting is to lose it in a course of play where the company never parts, though the person may not be actually gaming the whole time." Nares, Justice, concurred and said: "The statute is remedial where the action is brought by the party injured, but penal where brought by a common informer."

It will be observed that, in this case, the decision was made to turn upon the fact that the guineas were lost "at one sitting," and that, too, in a remedial action by the loser himself. Taking this to be the proper construction of the statute, the question is, whether the complaint stated facts sufficient to constitute a cause of action under it. The seventh section, under which this action was brought, is certainly penal in its character. The action being by a stranger, who had no privity with the defendants, for a penalty on account of an alleged legal wrong which did not exist at common law, but only in the statute, we think it was necessary that the precise facts constituting that wrong should be alleged, and if there was a failure to do so, that failure could not be cured by the common law, which, as to actions of a different kind, has sometimes been called a nursing mother. An act lacking any of the elements of the thing made penal by the statute, was not that for which this peculiar action was allowed. It has been held in New York, in reference to a



---

Opinion of the Court.

---

similar statute, that "the statute gives no form of declaring where a common informer is plaintiff. And in an action founded on a statute, the plaintiff must state specifically the cause of action coming under the statute." *Cole qui tam v. Smith*, 4 John. 193.

We do not see that our Code of Procedure (which, it seems, in regard to the form of action, makes no exception as to actions for penalties,) alters the case. The leading principle upon which the code proceeds, is that the pleadings shall contain the fundamental facts and no more. Technicalities are disregarded, and it may be that the statutory offense could be stated sufficiently without using the very words of the statute, but that could only be done by the use of such other words as expressed the exact wrong made penal. The general rule in an indictment for a statutory offense, and we suppose the same would apply to an action upon a penal statute, is that it is sufficient if the offense be stated in the words of the act, which is possibly the safest course, but is not indispensably necessary. Penal acts are not to be construed so strictly as to defeat the obvious intention of the legislature. They are to be construed strictly in that sense, that the case in hand must be brought within the definition of the law, but not so strictly as to exclude a case which is within its words taken in their ordinary acceptation. That is to say, there is no peculiar or technical meaning given to language in penal more than in remedial laws.

Apply this principle to the complaint here. It did, with many reiterations, allege that the defendants won so many dollars at play from the person named, *on particular days named*, but it did not state the exact facts denounced by the statute as objectionable, to the extent of allowing a stranger to recover from the winner treble the amount so won. It did not attempt to state the offense in the words of the statute, nor indeed in equivalent words. The word "sitting" does not occur in the complaint, nor "any time," unless it may be considered that the words "on or about" a particular day named, meant "some time," and that, as argued, was equivalent to "any time." We do not regard time as important in reference to any particular day within three months, but necessary as to the manner in

---

April Term, 1882.

---

which the money was won, viz., "at one time or sitting," which, as we think, was an important element of the offense under the statute.

It is insisted, however, that if the averments of the complaint were imperfect and incomplete, it was, under the code, incumbent upon the defendants to correct them by a motion to render them more definite and certain by amendment. Sometimes this is the proper remedy, but that must depend upon the inquiry whether the defects amounted to an entire failure to state any cause of action, or only a statement of it in an insufficient or informal manner. In the latter case, the remedy is by motion to make the faulty pleading more definite and certain, as in the case of *Childers v. Verner & Stribling*, 12 S. C. 4.

This proceeding by motion takes the place of a demurrer for want of form, or, as it was called under the old system of pleading, "a special demurrer." But if the averments are so defective, if the omission of material facts is so great, that even under the rule of a liberal construction, no cause of action is stated, it is not a mere case of insufficiency, but one of complete failure, and, in such case as we understand it, the proper remedy is by demurrer, and, subject to the right of amendment in particular cases, the complaint should be dismissed as in the case of a general demurrer sustained under the old system. Mr. Pomeroy says: "The true doctrine to be gathered from all the cases is, that if the substantive facts which constitute a cause of action are stated in a complaint, or can be inferred by reasonable intendment from the matters which are set forth, although the allegation of these is imperfect, incomplete and defective, such insufficiency pertaining, however, to the form rather than the substance, the proper mode of construction is not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment." *Pom. Rem.*, § 549.

According to these well-established principles, was the defect in this complaint one of substance or of form merely? Were the facts necessary to support the action stated in the complaint? It is conceded in all the books on code pleading, that it is very difficult in many cases to discriminate between the two conditions

---

Opinion of the Court.

---

of partial and of total failure, and that it is utterly impossible to frame any accurate general formula which shall define the insufficiency of the averments and embrace all the possible instances within its terms. This difficulty touches the precise point of this case. Whilst it is admitted that the authorities on the subject are not all in accord, considering the nature of the action and the fact that the matter omitted constituted the essential element of the statutory offense, we are constrained to hold that really no cause of action was stated in the complaint, and that the defendants could not be required to help the plaintiff to make a case, where none was charged, against themselves. If a good cause of action under the statute had been alleged, no matter how imperfectly, the result would have been different. But taking all the facts as alleged to be true, they do not furnish a cause of action under the statute, and we think the Circuit judge committed no error in sustaining the demurrer.

The cause came on for trial, and, while being heard before a jury, the defendants put in a verbal demurrer under subdivision 6 of section 167 of the code, "that the complaint did not state facts sufficient to constitute a cause of action." The plaintiff joined issue, insisting that the complaint was sufficient, but asked the court, if it should hold otherwise, "for leave to amend by inserting in each cause of action such words as the court should deem necessary and proper." The judge sustained the demurrer and refused the motion to amend, and the question now is whether the refusal of the motion to amend was error of law reviewable by this court. The order proposed was in very general terms, asking leave to insert "such words as the court might deem necessary and proper;" but, seeking only the substantial rights of the parties, we lay no great stress upon that.

The code of procedure, from its dread lest the proper requirements as to form should degenerate into mere technicalities, has made most ample and liberal provisions for amendments at the trial itself, or at any other time in the progress of the cause. We are thoroughly in accord with the spirit of the code in its liberality in allowing amendments and in its opposition to the decision of controversies not involving the merits; but some rules are absolutely necessary, and all the writers on the codes agree

---

April Term, 1882.

---

that there is some limit to the right of amendment. If the right were universal, and extended to all parties and under all circumstances, there would be no difficulty, but as it does not, there must be some judgment as to the proper cases for its application.

When the application is made at the trial, it is addressed to the discretion of the Circuit judge, and the exercise of that discretion is a most delicate and responsible duty, enhanced possibly in this case by the fact that if the amendment is not allowed, the action given by the statute will probably be barred. We agree entirely with what Judge Withers said in the case of *Mobley v. Mobley*, 7 Rich. 432: "Than judgments founded on the exercise of legal discretion, there is no description of official duty more perplexing to the judge who renders and the tribunal which reviews such judgments. The efforts of jurisprudence have always been earnest and diligent to render its maxims, its standards, precise, fixed, intelligible, and to substitute exact prescriptions for the necessary uncertainties of discretion." But after all there must, to a certain extent, be the exercise of discretion, sound discretion guided by law, "regulated by rule, not by humor."

Some of our cases would seem to indicate that, when the discretion of a judge has been exercised upon a motion to amend, his decision ordinarily is not appealable. *Cureton v. Hutchinson*, 3 S. C. 606; *Chichester v. Hastie*, 9 S. C. 334; *Mason v. Johnson*, 13 S. C. 20. An order involving merely the exercise of discretion cannot be appealable, as error of law cannot be averred against such an order. No general rule can be laid down upon the subject. There may be cases in which the exercise of that discretion will be reviewed, especially where the motion to amend is refused and the case is thereby ended, such order being somewhat in the nature of a final judgment. But as to amendments, much must be left to the discretion of the Circuit judge, and the exercise of it, as a rule, will not be disturbed, unless it deprives a party of a substantial right, which he can show he is entitled to under the law.

Did the plaintiff, whose complaint had been declared insufficient at the trial, have the right to an order to amend his complaint and go on with his case? The Circuit judge thought not, and

## Opinion of the Court.

refused it. A demurrer under the code for want of sufficient facts is said to be something like a "general demurrer" under the old system of pleading (*Bliss*, § 413); and there is no doubt an order allowing a general demurrer under that system ended the case, and was a final judgment between the parties. *Bagley v. Johnston*, 4 Rich. 22; *Gaillard v. Trenholm*, 5 Rich. 356, and notes.

But the code is more liberal in allowing amendments after demurrer allowed. There is, however, difference of opinion as to the extent to which it should go. There is, undoubtedly, much conflict in the cases upon the subject, particularly in the States of New York and Wisconsin. In one class of cases, even after demurrer sustained to the complaint, the plaintiff will be allowed, upon terms, to amend by inserting in his complaint a new cause of action, whenever such new cause does not make it necessary to change the summons. *Brown v. Leigh*, 49 N. Y. 79. But our code, in reference to amendments at the trial, seems to limit the right "to inserting allegations material to the case where the amendment does not change substantially the claim or defense." *Code*, § 196.

And, as far as we are able to ascertain, the most approved rule, and that certainly most in accord with all the analogies of pleading, is that an exception is made in those cases where the plaintiff proposes to set up a wholly different cause of action in place of the one which he attempted to set up in his original pleading, and, in such case, the motion comes too late. The leading case in this line of decision is that of *Supervisors v. Decker*, 34 Wis., citing *Brayton v. Jones*, 5 Wis. 117, and appendix. See *Bliss Code Pl.*, § 429; *Pom. Rem.*, § 566; *Wait An. Code* 328, note. Mr. Pomeroy expresses it thus: "In giving a practical interpretation to the clauses of the code, a conflict of decision has arisen among the tribunals of the different States, which it is utterly impossible to reconcile. The rule is established by one class of cases, that in all the voluntary amendments before trial, for which the party applies to the court by motion, including those rendered necessary by the sustaining of a demurrer to his pleadings, he cannot, under the form of an amendment, change the nature and scope of his

---

April Term, 1882.

---

actions; he cannot institute a wholly different cause of action in place of the one which he attempted to set up in the original pleading," &c.

Taking this as the rule, we have certainly held that the complaint did not state facts necessary to constitute the peculiar action given by the statute to a stranger. The motion to amend it in the manner stated involved the right to insert "a wholly different cause of action;" indeed, a new cause of action, as none under the statute had been sufficiently stated. We think, therefore, that the judge, in refusing the order to amend, committed no abuse of his discretion which this court should correct. In view of the salutary principle of amendment we were inclined to a different result; but we are less reluctant to affirm the judgment when we consider the nature of the action, which, though civil in form, certainly partakes somewhat of the nature of a criminal proceeding. As stated by the judge, "this is a technical action, not founded on contract or consideration, but upon the strict-letter of the law, and must be judged accordingly."

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

---

STATE v. PADGETT.

1. Where jurisdiction of a misdemeanor is conferred upon an inferior court, the Court of General Sessions has also jurisdiction, unless in terms denied to the superior tribunal, or exclusively given to the inferior.
2. The Court of General Sessions has jurisdiction of the offense of selling seed cotton at certain hours; for the statute prohibiting such sale confers jurisdiction upon that court as well as upon the court of trial justices, and imposes as a punishment a fine of \$50, or imprisonment for thirty days, or both, which last alternative is beyond the jurisdiction of the inferior court.
3. A trial justice, having issued his warrant for the arrest of the defendant, did not thereby assume to his court jurisdiction to try the case.
4. The amendment by the legislature of a statute which was not clearly expressed, does not show that the former statute was incapable of execution.
5. "An act to prohibit the sale of seed cotton between the time of the setting and rising of the sun," prohibited such sale "between the hours of sun-

---

Opinion of the Court.

---

down and sunrise of any day." *Held*, that the time within which the sale was forbidden by this act, was between sunset and the next succeeding sunrise, and that the offense was sufficiently charged in an indictment alleging a sale "at nine o'clock in the night of the same day."

---

Before HUDSON, J., Orangeburg, October, 1881.

These were two prosecutions against the same defendant, Joel Padgett, for selling seed cotton on November 2d, 1880. In one case, the alleged sale was of three hundred pounds at nine o'clock at night, and in the other, of two hundred pounds at ten o'clock at night. Other facts are stated in the opinion.

*Mr. M. I. Browning*, for appellant.

*Mr. Solicitor Jervey*, contra.

December 11th, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. These were indictments under the act of 1877, "To prohibit the sale of seed cotton between the time of the setting and rising of the sun, and to regulate the sale of seed cotton." 16 *Stat.* 266. 'The only difference between the two cases was as to the amount of cotton alleged to have been purchased and the hour of the night at which it was done, and therefore they were heard together.

The cases were commenced as usual by warrants for arrest of the defendant, issued by a trial justice, who, after examination, bound over the defendant and sent the cases up to the Court of General Sessions for trial. The indictments charged "That Joel Padgett, late of the county and State aforesaid, on the second day of November, 1880, with force and arms, at Willow township, in the county and State aforesaid, at *nine o'clock in the night of the same day*, did unlawfully buy," &c.

The cases were tried by Judge Hudson. The defendant denied the jurisdiction of the Court of General Sessions, claiming that the trial justice, having issued the warrants of arrest, had exclusive jurisdiction to try the cases. The judge refused to sustain

---

April Term, 1882.

---

the objection and sent the cases to the jury. The verdict was "guilty" in both cases, and the judge in each case sentenced the prisoner "to pay a fine of twenty-five dollars and costs, or be imprisoned in the county jail for a period of thirty days."

The defendant moved in arrest of judgment, which was refused, and he now appeals to this court and renews the motion upon the following grounds: First. Because his Honor erred in overruling the pleas to the jurisdiction made in said actions, the defendant contending that this court and the court of trial justice having concurrent jurisdiction of the offenses charged, and the proceedings having originated in the latter court, that the actions should have proceeded to judgment therein. Second. Because the allegations in the indictment, that the said offenses were committed "in the night time," does not state the offense created by the statute which forbids the "buying," &c., "between the hours of sundown and sunrise of any day."

First. The offense created by the statute, which is charged in this case, did not exist at the time the constitution was adopted, but that instrument contains a provision which covers it. By section 18 of article IV. of the constitution it is provided, "That the Court of General Sessions shall have exclusive jurisdiction over all criminal cases which shall not be otherwise provided for by law." If the jurisdiction is otherwise provided for, the exclusive jurisdiction of the Court of General Sessions is taken away, but not its jurisdiction. That remains and is concurrent with that of the other tribunal, unless to the inferior jurisdiction exclusive jurisdiction is given, or unless to the superior tribunal all jurisdiction should be *in totidem verbis* denied. "A statute which simply confers jurisdiction of a crime on an inferior court generally, and not exclusively, cannot be considered to deprive the Court of General Sessions of its jurisdiction, but the jurisdiction remains concurrent with that of the Superior Court." *State v. Williams*, 13 S. C. 548.

This case does not fall under section 19, article I. of the constitution, which provides "That all offenses less than felony, and in which the punishment does not exceed a fine of \$100, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law." It



---

Opinion of the Court.

---

does not do so for the reason that the punishment of the offense, imposed by the act, may be both fine and imprisonment, so that exclusive jurisdiction is not given to the trial justice from the nature of the punishment imposed. *State v. McKettrick*, 14 S. C. 350. And besides the act itself, which creates the offense, provides "That any person, &c., upon conviction in the Court of General Sessions or of a trial justice, shall be fined in the sum of fifty dollars, or imprisoned in the county jail for a period of thirty days, or both, in the discretion of the court." 16 *Stat., supra*.

It is said, however, that whilst jurisdiction is expressly given by the act to the Court of General Sessions, it is also given to the court of trial justice, and the jurisdiction being concurrent, and the court of trial justice having first assumed jurisdiction, that of the Court of General Sessions is ousted. There is no conflict of jurisdiction here. The trial justice court is not claiming jurisdiction. It is the duty of the trial justice to issue his warrant of arrest in all proper cases when applied for. We do not think this initiation of the proceedings is assuming jurisdiction to try the case, but merely a preliminary step to arrest the party, which is necessary to his being tried in any court. The trial justice did not claim jurisdiction to try the case, but upon examination sent it to the Court of General Sessions to be tried there. We see no error in that court taking jurisdiction and trying the case.

Second. The other objection is that the offense being one created by statute, was not sufficiently set forth in the indictment. The words of the act are: "That it shall not be lawful for any person to buy or sell, or receive by way of barter, exchange or traffic of any sort, any seed cotton between the hours of sundown and sunrise of any day." The indictment charges that "Joel Padgett, on the second day of November, 1880, at nine o'clock in the night of the same day, did unlawfully buy," &c., and the question is whether the indictment sufficiently charges the offense created by the act. This is more a question of construction of the act than of pleading. It is certainly true that the act of the legislature is not very clearly expressed, and on that account, perhaps, the legislature, in December, 1880,

---

April Term, 1882.

---

amended its phraseology. But that was after the offense charged here had been committed, and can have no effect upon this case, which must stand or fall according to the terms of the law as originally expressed. Nor, on the other hand, do we think that, because the legislature chose to amend the law which was not clearly expressed, we would be justified in assuming from that fact, that, in the opinion of the legislature, the law as it originally stood was incapable of being enforced, and the original act was repealed and not merely amended by the last acts. The question simply is, whether under the original act, unaffected by the subsequent amendment, this indictment sufficiently sets forth the statutory offense charged therein.

The rule in regard to indictments framed to cover offenses created by statute is, "that the offense should be set forth with clearness and certainty, and must be so described, if not in the very words of the statute, so as to bring it substantially within the provisions of the statute." 1 *Arch.* 286; *State v. Vill*, 2 *Brev.* 262; *State v. Cunningham*, 2 *Spears* 246; *State v. Cullum*, *Ib.* 582. In the case from Brevard the court say: "The offense is charged in the indictment substantially and sufficiently pursuant to the statute, and although there is not a perfect similarity in the words, there is no variance in the sense, nor can the variance create any doubt in the operation or construction of the law."

In the case before us the words of the act are, "between the hours of sundown and sunrise of any day," and the words of the indictment are, "in the night-time." Does the indictment charge that the offense was committed substantially at the time forbidden by the act? We can have no doubt of what was the intention of the legislature in the use of the words "between the hours of sundown and sunrise of any day." The object of the legislature manifestly was to make criminal the sale of such cotton in the night-time. In construing an act we have a right to refer to the title, and the title of this act uses the words "between the time of the setting and rising of the sun," without reference to any day, which shows what was the intention. From these words can there be a reasonable doubt that the

---

Opinion of the Court.

---

intention was to express the period of time lying between sundown of one day and sunrise of the next? The law-makers, taking as a starting-point sundown, evidently intended to count forward and not backward, to include the period of time succeeding and not preceding the setting of the sun, the period of darkness until the next and not the period of light back to the last "rising of the sun."

But it is urged that the superadded words in the act, "of any day," negatives this construction; that the use of these words, which have lately been repealed, makes it necessary to inquire whether the night can be said to be "of" the day—that is to say, belonging to or proceeding from the day. The division of time which most strikes us, is that into day and night. One rotation of the earth in twenty-four hours produces a period of light and a period of darkness of about equal length, and it is entirely conventional at what point of the circle we begin to make the count; but of the two periods, that of light, the artificial day, is the most important to us, and from this or some other cause we habitually, in common parlance, speak of the night which succeeds a day as the night "of" that day—that is to say, the night that follows, that belongs to that day. "A day is usually intended of a natural day, as in an indictment of burglary we say in the night of the same day." *Co. Litt.* 135.

The framers of this act doubtless used the words "of any day" in this sense, and meant the whole period of darkness between sundown of one day and sunrise of the next. According to this construction, the period of time within which the statute inhibited the purchase of seed cotton was the whole of the night succeeding, following, the day indicated, and the charge that the offense was committed in the night succeeding the day of November 2d, 1880, is substantially in accordance with the sense of the act, although not with its exact words. It is insisted that we cannot thus reach the intention of the act, but must construe its words according to their technical meaning, and that thus construed, it cannot be said that the night is "of" the day—that being a penal statute it must be construed strictly. That certainly is the rule, but proper construction in order to ascertain the intention, surely is admissible.

---

April Term, 1882.

---

In the case of *State v. Brown*, 2 *Spears* 136, Judge O'Neill says: "It is said penal statutes are to be construed strictly and nothing is to be included in them by intendment. There is no doubt this is the general rule, but it is also a rule that the courts are not to narrow the construction so that offenders may escape. 'We are to look to the words in the first instance,' said Buller, J. (1 *T. R.* 96), 'and when they are plain we are to decide on them; if they are doubtful, then we are to have recourse to the subject-matter,' and in a late work (*Dwarries on Statutes* 79) it is said, 'Statutes, though penal, have been taken by intendment to the end that they should not be illusory, but should take effect according to the express intendment of the makers of the act.'" And in the case of *State v. Cunningham*, *supra*, it was held that "when the intent of an act is plain, to effect it, words and even parts of sentences may be transposed." It is true that the word "night" does not appear in this act, but who can doubt that it was intended by the words "between the hours of sundown and sunrise of any day."

If, notwithstanding the manifest intent, we must be limited to the scientific meaning of the words, then we agree that the division of time adopted by Pope Gregory XIII., is a part of our law. According to that calendar the civil, as distinguished from the artificial "day," is defined to be "the whole time or period of one revolution of the earth on its axis, or twenty-four hours," called the "natural day." "And the evening and the morning were the first day." *Genesis*, ch. 1. In this sense the day may commence at any period of the revolution. The Babylonians began the day at sunrising, the Jews at sunsetting, the Egyptians at midnight, as do several nations in modern times, the British, Spanish, American, &c. This day, in reference to civil transactions, is called the civil day. Thus, with us, the day on which a legal instrument is dated, begins and ends at midnight. *Webster's Dictionary, Unabridged*.

Even according to this scientific definition of the word "day," the act in question prohibited the purchase of seed cotton between the hour of sunset and the middle of the night succeeding, that being the end of the previous day. The indictment charged that the offense was committed "at nine o'clock in the night of

---

Circuit Decree.

---

the same day," viz., November 2d, 1880. That was within the time covered by the act, according to the strictest construction, and we cannot say that this manner of stating the offense as to time, was insufficient under the statutes.

The judgment of this court is that the judgment of the Circuit Court in each of the cases stated be affirmed, and the appeal dismissed.

---

## TOBIN v. MYERS.

1. Both judgment and execution are links in the title to land purchased at sheriff's sale; and while mere irregularities in them will not avoid the sale, the rule is different where either judgment or execution is absolutely void.
  2. A judgment is presumed paid after twenty years have elapsed since its entry, notwithstanding an *ex parte* renewal of the *fi. fa.* within that time. *Dillard v. Brian*, 5 Rich. 502, recognized and followed.
  3. A sale of land under a judgment more than twenty years old, held null and void.
- 

Before HUDSON, J., Barnwell, March, 1882.

Action by J. Allen Tobin and August Zissett. The case is fully stated in the order of the Circuit judge, as follows:

On May 14th, A. D. 1860, Duncan, Moloney & Co. recovered judgment, by confession, against Gideon S. Brown, of Barnwell, had the same duly entered up, and execution issued and lodged on the same day, for \$290.75 and costs.

This judgment and execution lay dormant from that day until May 11th, 1880—no payments having been made thereon, no levy made, and no renewal of the execution until the last named day, when, without notice, and without leave of the court, either asked or obtained, the execution was renewed by the clerk, and a levy on the said May 11th, A. D. 1880, was endorsed thereon by the sheriff, of a certain lot in the town of Barnwell, the property of said Gideon S. Brown, then in the possession of H. M. Myers, Jr., the executor of the last will and testament of the said testator, Gideon S. Brown, who had died in 1878, leaving

---

April Term, 1882.

---

of force his said last will, in which the said Myers was nominated as executor, and had duly qualified. It seems that the other defendant, Marion S. Myers, and perhaps others of the family of the said testator, were likewise in possession; but this we are not sure that the testimony clearly shows. Certainly, the two defendants are in possession.

Under the levy made May 11th, 1880, the lot was sold and bid in by Laura C. Tobin, whose bid was duly transferred to the present plaintiffs, to whom the sheriff conveyed the said lot of land on January 14th, A. D. 1882, the sale having been made September 5th, 1881. On January 17th, A. D. 1882, the plaintiffs began this action to recover the possession of the lot of land of the defendants, who, by their answer, put the title in issue.

To establish title, the plaintiffs put in evidence the deed of the sheriff, based upon the judgment and execution, levy and sale aforesaid, all of which were in due form proved. This muniment of title and proof of the long possession of the lot of land, and its use and occupation by Gideon S. Brown, made the plaintiffs' case, and they rested.

The defendants' counsel moved for a non-suit, upon the ground that the levy, sale and conveyance of the sheriff aforesaid, were null and void; that the renewal execution was without authority, and conferred no power whatever upon the sheriff to make the levy and sale.

I concur in the view urged by the defendants' learned counsel, which was earnestly and ably combated by the learned counsel for the plaintiffs. At the date of the renewal of the execution, the judgment wanted but three days of being twenty years old. Even an authorized renewal of the execution would not have infused new life into the judgment, nor have checked the currency of the period of presumption of payment, much less did an illegal renewal have this virtue. Hence the period of presumption of payment ran on and became complete long before the sale on September 5th, 1881. Nor would the levy on May 11th, 1880, on an illegal renewal of execution, have the effect to cut short the currency of the twenty years—the period of presumption—so that when the sale was made, it was under a

## Circuit Decree.

judgment that had been dormant for more than twenty-one years; no effort having been made within that time to revive it. The mere renewal of a *fi. fa.*, even when regular, does not arrest the currency of the twenty years which raises the presumption of payment of a judgment. See *Dillard v. Brian*, 5 Rich. 502.

But should we regard the judgment as not affected with this presumption of payment, still there was no execution which authorized a levy and sale; and perhaps this is the turning-point in the argument at last.

Twenty years, wanting three days, had elapsed since the lodgment of the first *fi. fa.*, before a renewal is sued out; and this is done without any notice to the executor of the judgment debtor, who had been two years dead. No notice, no summons, no *sci. fa.* is issued, and no order or leave of the court is had. Under the law, prior to the adoption of the code, the original *fi. fa.* was defunct, and could only have been renewed on *sci. fa.* to Gideon S. Brown.

Did the last clause of section 307 of the code revive and restore to the plaintiffs' execution a right which had been forfeited three years before the adoption of the code? Because, after May 14th, 1867, they had lost the right to renew without leave of court upon *sci. fa.* issued. Section 317 of the code saves to executions all their incidents not supplied by or in conflict with the provisions of title IX., chapter I.; and we think the incidents to the renewal of this execution are not supplied by the last clause of section 307, but rather by the previous clauses of the section, if at all.

Did that law of 1870 confer upon the plaintiffs the right to renew without notice to the executor of the deceased debtor, and without leave of the court, as late as May 11th, 1880, simply because an execution had been issued, but lay dormant, since May 14th, 1860?

We think not. And our conclusion is that the execution issued May 11th, 1880, and lodged as a renewal of that lodged May 14th, 1860, was null and void, and that all proceedings thereunder, including the sale of the lot and conveyance to the plaintiffs, are null, and conveyed no title. The motion for

---

April Term, 1882.

---

non-suit is, therefore, granted; and it is adjudged that the complaint stand dismissed with costs.

From this decree the plaintiffs appealed on the following exceptions:

1. For that his Honor erred (as it is respectfully submitted) in holding that the renewal of the execution herein by the clerk, without notice to the executor of the defendants and leave of the court, was null and void. But that his Honor should have held that leave of the court, in a case where the judgment was less than twenty years old, and where the first execution was issued within five years from the entry of the judgment, was not necessary, and that the renewal by the clerk was valid.

2. That his Honor erred in holding that all proceedings under said execution, as renewed by the clerk, including the sale of the lot and conveyance to the plaintiffs, are null, and conveyed no title. But that his Honor should have held that if notice to the legal representative of the deceased defendant, and leave of the court to renew the execution, had been necessary, the failure to give such notice, and to procure such leave, were mere irregularities which do not affect the title of the purchasers.

*Mr. Robert Aldrich*, for appellant.

*Mr. J. C. Davant*, contra.

December 11th, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. [Omitting the statement.] A judgment is registration of what the court decides. A writ of execution is judicial process to enforce that judgment. One is passive and the other active. Both the judgment and execution are links in the title to property purchased at sheriff's sale; both are necessary, and if either is void, the title of the purchaser fails. For reasons of policy to sustain sheriffs' sales, purchasers at such sales are favored to the extent that mere irregularities in the process will not avoid the sale. If purchasers at their peril were held responsible for the perfect regularity of process



## Opinion of the Court.

under which property is sold, the result would be that property would be sold at a sacrifice, and the usefulness of such sales be greatly impaired, if not destroyed; but this rule, as to mere irregularities, does not apply where either the judgment or execution is absolutely void.

The first objection to the title in this case is that the judgment under which the sale was made, was, at the time of the sale, paid and satisfied by operation of law, and was, therefore, *functus officio*; that twenty years presumes payment, and that more than that time had elapsed. To this it is answered that three days before the twenty years had expired, the plaintiffs procured the clerk of the court, without notice to the defendant in execution, or, he being dead, to his executor, to issue a new execution, which was levied on the lot in controversy, and that this *ex parte* action of the plaintiffs shows that they did not sleep over their rights during the whole period of twenty years, and stopped the completion of the time necessary to raise the presumption of payment. As the execution is the only means which the plaintiff has to enforce payment of his judgment, and it is in one sense connected with the judgment, there has been some difference of opinion as to the effect of a renewal of the execution in regard to the running of the time necessary to presume payment of the judgment. But, after very full consideration, it was held by the old Court of Appeals in the case of *Dillard v. Brian*, 5 Rich. 501, that "the period of time (twenty years) which raises the presumption that a judgment is satisfied, begins when the judgment is entered up, and not when the last renewal *fi. fa.* is tested or loses its active energy." This is in point, and unless overruled, must control this case. We will not re-open the argument. Counting from the rendition of the judgment on May 14th, 1860, (disregarding the effort to renew by mere copy on May 11th, 1880,) to September 5th, 1881, when the lot was offered for sale, nearly twenty-one years had elapsed, and the artificial force of the presumption had attached. *Willingham v. Chick*, 14 S. C. 102; *Boyce v. Lake*, 17 S. C. 481.

This view is conclusive of the case, and it is unnecessary to consider the other questions raised, whether the execution, under which the levy was made, was renewed according to law, and if

---

April Term, 1882.

---

not, whether said execution was absolutely void or only voidable. There can be no valid execution or sale under it, when the judgment on which it was issued is satisfied either in law or in fact. When the land in this case was sold, more than twenty years from the rendition of the judgment had expired and raised the presumption of payment, which was not rebutted by the *ex parte* effort of the plaintiffs to renew the execution. "To explain the indulgence there must be some act or admission on the part of the defendant, showing the continuance of the debt. In the issuing, returning and renewing of executions, the defendant has no action. It may be done and redone for forty years, and unless he is astute enough to examine the clerk's and sheriff's offices, he will be ignorant of the facts." *Dillard v. Brian, supra.*

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

EARLE v. HARRISON.

1. A finding of fact by the Circuit judge, from written testimony submitted to him, sustained.
2. Where a testator, by his will, left a tract of land, the residuum of his estate, to his son F., out of which F. was to pay to another son J. and to a daughter E., to each, one-third of its value, and F., having settled with J., died intestate, J. is an incompetent witness, in behalf of E., to prove communications made to him by F. in relation to a claim of E. against her father's estate, payable out of this residuum. But a son of E., who was also executor of the testator, is not incompetent. *Code, § 400 [415].*

---

Before KERSHAW, J., Anderson, March, 1881.

The opinion fully states the case. It may be added, however, that the case was heard on testimony taken by the master and reported to the court.

*Mr. Jos. N. Brown*, for appellants.

*Mr. B. F. Whitner*, contra.

---

Opinion of the Court.

---

December 11th, 1882. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. Francis E. Harrison, late of Anderson county, died intestate in November, 1878, seized and possessed of a considerable estate, and leaving a widow, Elizabeth P. Harrison, and a number of children. Administration upon his estate was granted to E. P. Earle, the plaintiff, who, as early as February 5th, 1879, instituted this proceeding, which was in the nature of a creditor's bill to sell lands in aid of personal assets to pay debts, injunction, &c., although it was not distinctly charged that the estate was insolvent.

The widow and children, the heirs-at-law, were made parties, as well as some of those claiming to be creditors, viz., Mrs. Elizabeth H. Whitner, J. W. Norris and the State Savings Bank at Anderson. As it appeared from the answer of Mrs. Elizabeth H. Whitner, a sister of the intestate, that she had claims against the estate, growing out of the estate of their father, James Harrison, deceased, the executors of his will, James W. Harrison and James H. Whitner, were also made parties. The creditors of the estate must have been few in number, as there was no order calling in creditors, but Mrs. Whitner, in her answer, presented two claims against the estate, which were resisted by the administrator and heirs, and are the only matters in controversy which have been brought to the attention of the court. They were as follows:

First. James Harrison, late of Anderson county, the father of Mrs. Whitner (wife of Judge J. N. Whitner), Francis E. Harrison, the intestate, and James W. Harrison, executed his will, in 1858, by which he disposed of a large estate to his then afore-said children. A copy of the whole will is not in the brief, but it is not denied that the extracts given are correct. After disposing of the family homestead on the Savannah river, "Andersonville," to Francis E. Harrison, and making certain other specific devises, the eighth clause provided as follows: "I give and bequeath the rest and residue of my estate, real and personal, in equal shares to my daughter Elizabeth H. Whitner, and my sons James W. Harrison and Francis E. Harrison, desiring and expecting that the same may be divided by and amongst them-

---

April Term, 1882.

---

selves in such way as will be convenient and just, with a becoming spirit of confidence and liberality," &c.

It does not appear what property fell under the residuary clause, but it is admitted that the Mason tract of land, in the county of Anderson, constituted part of the residuum under the will, but in reference thereto the testator, on February 18th, 1862, executed a codicil to his will, in these words: "It will be seen by reference to my said will that no specific mention is made of the tract of land in Anderson district, known as the Mason tract, though I have often declared verbally that it was my wish that the same should be held and enjoyed by the proprietor of the Andersonville lands, being in my judgment a necessary appurtenant, the more especially as a provision farm, and now, therefore, I specifically declare and hereby give and devise the said tract of land to my son Francis E. Harrison, the same to be accounted for by him at its fair value, as so much of his share of the residue of my estate, as directed to be divided between and among my children, legatees under my will, as therein set forth," &c.

In June, 1865, the testator, James Harrison, died, leaving in full force the said will and codicil, naming his sons, James W. Harrison and the said Francis E. Harrison, and his grandson, James H. Whitner, as executors, but, there being no debts and the beneficiaries all being *sui juris*, and named as executors, the will was never admitted to probate until lately. The parties seemed to suppose that they could settle among themselves, but, as it often happens in such cases, it has turned out that they were mistaken, and we cannot refrain from saying that it would have been better if the will had been admitted to probate immediately after the death of the testator and the estate settled while all the parties were living.

There are some glimpses in the evidence that the parties had some settlement among themselves, but Mrs. Whitner claimed that under the provisions of the will and codicil above stated, she was entitled to one-third of "the fair value" of the Mason tract of land devised to the intestate, Francis E. Harrison, which was a charge upon the same; that during his life he always

---

Opinion of the Court.

---

admitted his liability to pay the same, but had never done so at the time of his death.

Second. The other claim of Mrs. Whitner is thus stated by herself in her amended answer: "The claim against her late father and chargeable against his estate in the hands of the said F. E. Harrison, is his obligation for the payment of \$1,020.80, given to equalize the defendant and her late husband in advancements of real estate, bearing interest from 1st of January, 1848, which remains unpaid; that the said James Harrison continued to acknowledge this as a subsisting obligation, and the said F. E. Harrison repeatedly in his life-time recognized it as a claim to be paid out of his father's estate, and agreed with this defendant that the sum should be paid, with interest, from the — day of —; and this defendant alleges that the said Mason tract of land, being the residuum of her father's estate, and held by the said F. E. Harrison at the time of his death, as such is chargeable with the payment of the said sum and interest thereon."

Letters of the intestate, F. E. Harrison, down to a short time before his death, particularly as to the claim for one-third of the value of the Mason tract of land, were given in evidence, and James W. Harrison and James H. Whitner, lately qualified as executors of the will of James Harrison, and made defendants in the case, were, subject to objection, examined as witnesses for the claimant, particularly as to declarations and admissions of the intestate, Francis E., in his life-time, in regard to the second claim on the obligation of her father, James Harrison.

The case was heard by Judge Kershaw, who sustained both claims, and decreed "that Mrs. Elizabeth H. Whitner is entitled as residuary legatee under the will of her father, James Harrison, to one-third of the value of the Mason tract of land, devised to the said Francis E. Harrison, which was due and payable to the said Elizabeth H. Whitner twelve months after the death of the said James Harrison. That the value of said land at the time the said Francis E. Harrison came into the possession of it under his father's will, and at the time the said legacy was payable, was six dollars per acre, and that this claim of the said Elizabeth H. Whitner was a charge upon the said land. \* \* \* It is further ordered that the said F. E. Harrison having recognized

---

April Term, 1882.

---

the obligation of his father, James Harrison, for the payment of one thousand and twenty and eighty one-hundredths dollars as a subsisting obligation against his estate, to the extent of its face value, as of the date it was given, to wit, on the 10th day of October, 1851, and having as a compromise of the matters between the estate of James Harrison and the estate of Joseph N. Whitner, deceased, agreed on the — day of January, 1874, that such obligation should be paid to the said Elizabeth H. Whitner, sole executrix and legatee of the said Joseph N. Whitner, the said Elizabeth H. Whitner is also entitled to be paid from the proceeds of the said Mason place, as that portion of his father's estate liable for the payment of debts, the further sum of \$1,289.76, with interest from January, 1874."

From this decree, the administrator and heirs of Francis E. Harrison appeal to this court upon the following grounds:

1. "Because the claim of the defendant, Mrs. E. H. Whitner, founded on the note of James Harrison to the Hon. J. N. Whitner, dated October 10th, 1851, for \$1,020.80, was without consideration, barred by lapse of time and the statute of limitations, and should have been rejected.

2. "Because the supposed obligation to pay \$1,020.80 was met by the acknowledgment of indebtedness of J. N. Whitner to said James Harrison for \$1,400, bearing date the 21st day of September, 1853.

3. "Because the said James Harrison, by his will, dated June 30th, 1858, gave to J. N. Whitner and his two sons, James W. and F. E. Harrison, all his lands in Florida, two-fifths to said J. N. Whitner, and the other three-fifths equally to his two sons, which, of itself, equalized the supposed inequality referred to in said memorandum or note, and should be construed as a substitution thereof.

4. "Because a parol promise, alleged to have been made in January, 1874, by intestate, to pay said sum of \$1,200 on a claim bearing date October 10th, 1851, is not sufficient in law to charge the estate of said F. E. Harrison with its payment.

5. "Because the promise proved by the witnesses was to pay only \$1,200, and the judgment at most should have been for only \$1,200, with interest from January, 1874.

---

Opinion of the Court.

---

6. "Because the said James H. Whitner and J. W. Harrison were not competent witnesses to establish said supposed claim.

7. "Because the estate of said F. E. Harrison should have been required to pay only \$5 per acre for the Mason lands, being the sum paid by him to James W. Harrison, his co-tenant."

First. Very little need be said as to the first claim. None of the exceptions object to the Circuit decree, giving Mrs. Whitner a charge upon the Mason tract of land, for one-third of its value in 1866, due to her by the intestate, F. E. Harrison. The evidence was full and uncontradicted, including letters from the intestate himself shortly before his death, that this claim, under his father's will, had never been paid. The only objection made to the decree, in this regard, is by the seventh exception, which insists that the Circuit judge erred in fixing the value of the land at \$6 per acre, claiming, as James W. Harrison sold his third interest in the land to his brother, estimating the value of the land at \$5 per acre, it should have been fixed at that price in reference to the third interest therein of Mrs. Elizabeth H. Whitner.

That was a question of fact decided by the Circuit judge upon the evidence, and in looking through it we see no sufficient reason to disturb that finding. James W. Harrison may have agreed to take from his brother less than the real value of the lands, and that should not control in estimating its value in reference to the interest of Mrs. Whitner. The only three witnesses examined as to the value of the land, Joseph A. McClusky, G. W. Maret and O. H. P. Fant, all concur in saying that in 1866 the Mason land was worth \$6 per acre. So far as this claim is concerned, it is the judgment of this court that the judgment of the Circuit Court should be affirmed.

Second. There is much more difficulty about the other claim. It is certainly very old, not arising under the will of James Harrison, but long anterior to the execution of the will, and entirely independent of it. James Harrison owned property in the State of Florida, as well as in Anderson. He had three children, Mrs. Whitner, James W. Harrison and Francis E. Harrison. It seems that about the year 1848 he made a partial division of his property among his children, and to equalize

---

April Term, 1882.

---

them, he gave to Judge Whitner an obligation, of which the following is a copy :

"Inasmuch as certain advances have been made to James W. Harrison beyond those made to J. N. Whitner, to wit, on account of lands adjoining the village of Anderson, being one-half of said lot of land (one-half having been promised him by his brother), which I estimate at five hundred dollars, and from concern of John C. Griffin & Co., the sum of five hundred and twenty and eighty one-hundredths dollars, do execute this my obligation, to secure as near equality as may be, should I not pay in my own life-time, and hereby promise to pay to J. N. Whitner the sum of one thousand and twenty dollars and eighty cents, with interest from the first day of January, 1848, being about the time of said advances to J. W. H.

(Signed,)

JAMES HARRISON.

"Oct. 10, 1851."

After this obligation was given there were money transactions between James Harrison and Judge Whitner, certainly one on September 21st, 1853, in which Judge Whitner acknowledged his liability to account to James Harrison for \$1,400, the price of stock in the Farmers' and Exchange Bank of Charleston.

On June 30th, 1858, James Harrison executed his will, by which he disposed of a large estate to his three children. As before stated, a full copy of the will is not before us, but it is stated that the will gave Mrs. Whitner more than an equal share of the Florida lands. Judge Whitner died in 1864, leaving Mrs. Whitner his sole devisee and executrix, and James Harrison died in 1865, leaving in full force the will with codicils above described, which named as executors F. E. Harrison, James H. Harrison and James H. Whitner, but it was not admitted to probate until after the death of F. E. Harrison, the intestate.

It did not certainly appear whether the parties interested under the will ever had a final settlement of the Florida property, but it was suggested that there had been such settlement, and that Mrs. Whitner had some claim growing out of it against the intestate, Francis E. Harrison. The executors of James Harrison, viz., James W. Harrison and James H. Whitner,



---

Opinion of the Court.

---

testified, subject to exception, that the intestate, Francis E. Harrison, in his life-time admitted his liability not only on the obligation of James Harrison to Judge Whitner, above described, but also on some claim not explained, growing out of the division of the Florida lands, and as late as January, 1874, agreed, by way of compromise, to pay the sum of \$1,289.76, with interest from January, 1874, which the Circuit judge decreed in favor of Mrs. Whitner, "to be paid from the proceeds of the said Mason place, as that portion of his father's estate liable for the payment of debts."

The administrator and heirs of F. E. Harrison object to this, allèging that the original obligation of James Harrison was without consideration and void; that James W. Harrison and James H. Whitner were not competent witnesses, under the code, to prove admissions of F. E. Harrison, he being dead; that if competent, parol proof of an agreement of F. E. Harrison to pay the debt of his father was inadmissible under the statute of frauds; that if the original obligation was binding as a debt upon James Harrison, it was, in fact, paid in his life-time, or if not paid was barred; and if the original obligation was not an ordinary debt, but to be accounted for at his death as evidence of advancements to the others, it was necessarily canceled and substituted by the large provision for Mrs. Whitner in the will. From the view this court takes, it will be necessary for this claim to go back to the Circuit for further evidence, and, therefore, it would not be proper to consider now the points made, except that, in relation to the competency of James W. Harrison and James H. Whitner, as witnesses in behalf of Mrs. Whitner, to prove the admission of F. E. Harrison, he being dead. Their testimony was taken subject to objection, but the Circuit judge seems to have made no ruling upon the subject, except by considering the testimony as if no objection had been made.

The general law was that no person offered as witness should be excluded by reason of an interest in the event of the suit. But by section 400 of the code (according to the late revision) it is enacted that a party may be examined as a witness, "provided, however, that no party to the action shall be examined in regard to any transaction or communication between such wit-

---

April Term, 1882.

---

ness and a person at the time of such examination deceased,  
\* \* \* as a witness against a party then prosecuting or  
defending the action as executor, administrator, &c., of such  
deceased person, when such examination, or any judgment or  
determination in such action, can in any manner affect the inter-  
est of such witness, or the interest previously owned or repre-  
sented by him," &c. James W. Harrison, a party, was offered  
as a witness against the administrator of F. E. Harrison, in  
regard to communications between him and F. E. Harrison, in  
his life-time, and the question is whether the judgment in the  
action can "in any manner affect the interest of such witness, or  
the interest previously owned by him."

It seems to us that the judgment will affect the interest of  
James W. Harrison. In order to simplify the matter, let us  
consider this as an action brought under the statute of 3 and 4  
W. & M., *Gen. Stat.*, § 1949, by Mrs. Whitner, as alleged cred-  
itor of James Harrison, against the administrator of his devisee,  
F. E. Harrison, and impleading also the executors of James  
Harrison, deceased, to make liable for the debt of the ancestor a  
certain tract of land (Mason) in possession of said F. E. Harri-  
son, as residuary devisee at the time of his death. See *Smith v.*  
*Grant*, 15 S. C. 146. If in this action there should be a  
recovery, upon whom would devolve the liability to pay that  
recovery? By the will, as it stood originally, that tract of land  
was given to be equally divided between F. E. Harrison, James  
W. Harrison and Mrs. Whitner, and if the codicil had not been  
executed, it is perfectly clear that the loss of payment would  
have fallen on the three owners equally.

Does the codicil, which simply made partition of the Mason  
land, by giving specifically the land to one charged with the  
shares of the others, make any change as to the liability of the  
respective parties? Two of the tenants in common cannot get  
their full shares in money, and leave the land in possession of  
the third to pay the whole debt of the ancestor; each must pay  
his share of any debt of the ancestor, which falls upon the  
Mason land. F. E. Harrison has purchased for value two-  
thirds of that land, according to the terms of the codicil, and

. W

---

Opinion of the Court.

---

he only holds one-third of it as a gift from his testator. A residuary devisee cannot be considered as having any interest from his testator until the testator's debts are paid. A man must be just before he is generous.

If James Harrison had left unpaid debts enough to absorb the whole of the Mason land, F. E. Harrison would really have received nothing from him in respect to that land, and if a debt of James Harrison takes a part of it, the same principle *pro tanto* must apply. The debt must be paid first, and then the thirds of James W. Harrison and Mrs. Whitner would be limited to what remained after the debt of the ancestor was paid out of it, or, having already received their shares of the whole, they must each pay one-third of the debt. It cannot alter the case that one of the residuary devisees is also the creditor of the ancestor seeking payment.

If, on the other hand, the execution of the codicil, by specifically giving the Mason land to F. E. Harrison, charged as aforesaid, took it out of the residuum, then it would follow that said land would not be any more liable for this debt of the ancestor than any other lands which passed under the will of James Harrison which are still in possession of the devisee. So that, in any view of the case, we think that the judgment would affect the interest of James W. Harrison, and that it was error to admit him as a witness against the administrator of F. E. Harrison as to communications had with him in his life-time. That he had sold his interest in the Mason tract of land to his brother, makes no difference; the words are "or the interest previously owned or represented by him."

James H. Whitner, the other executor of James Harrison, does not seem to have any interest in the event of the suit which would be affected by the judgment. He is the son of Mrs. Whitner, but relationship does not disqualify. We do not see that he was an incompetent witness.

The judgment of this court is that the judgment of the Circuit Court be affirmed, so far as relates to the claim of a charge upon the Mason tract of land to the extent of one-third of its value, and that in all other respects the decree be set aside without prejudice, and the case remanded for further evidence and

---

April Term, 1882.

---

consideration. If the claim of Mrs. Whitner against the estate of her father, James Harrison, should be established in whole or in part, the said recovery to be paid in equal parts by the three devisees, viz.: one-third by James W. Harrison, one-third by Mrs. Whitner herself, and only the remaining third by the estate of Francis E. Harrison, deceased.

---

HERNDON v. MOORE.

1. The decision in *Davenport v. Caldwell*, 10 S. C. 317, that the legislature cannot confer upon Probate Courts jurisdiction in partition, affirmed.
2. Proceedings for partition regularly had in the Probate Court prior to November 27th, 1878, when the judgment in the case of *Davenport v. Caldwell* was filed, is binding upon all the parties concerned.

Per MCGOWAN, A. J.—

3. The legislature has no power as *parens patriæ* to authorize the Probate judge to sell or partition the property of one not *sui juris*, especially where the property is owned in common with others.
4. The jurisdiction given by the constitution to Probate Courts "in all matters testamentary and of administration," does not include the right to make partition.
5. And "business appertaining to minors" in this grant of jurisdiction, means business peculiar to minors, and, therefore, does not include partition.
6. Adult parties to proceedings in partition in a court without jurisdiction, under which the lands are sold, and who receive the proceeds, are estopped from asserting title against the purchasers at such sale.
7. *Communis error facit jus* is a doctrine exceptional in character, but should be applied where the erroneous opinion has furnished the ground-work and substratum of practice, and has, to a large extent, affected the titles to land.

---

Before HUDSON, J., Union, March, 1881.

The facts of this case appear in the opinion. The Circuit decree, after a statement of these same facts, was as follows:

It seems to the court that the purchasers of these lands would have been proper parties to this cause, but as no objection has been taken by the pleadings to their non-joinder, I will consider the case as between the parties to the cause. The case discloses

---

Circuit Decree.

---

an equity in the plaintiff, which entitles her, as against her co-distributees, to a part of the relief which she demands.

The Court of Probate established by the constitution of 1868 was designed to take the place of the Court of Ordinary, but with enlarged powers. From the fact that the Court of Ordinary exercised jurisdiction in cases of partition within certain limits, no question was made of the right and power of the legislature to confer jurisdiction upon Courts of Probate, in cases of partition. The legislature of the summer of 1868, in their act organizing the Courts of Probate, conferred upon such courts jurisdiction in all cases of partition. No question was made of the constitutionality of this act. Lawyers in all parts of the State acted under it, Courts of Probate exercised this jurisdiction unchallenged, and the Circuit Courts recognized it and adjudged questions arising from such proceedings. Lands sold under orders of the Courts of Probate, realized the same prices as when sold under judgments of the Circuit Courts. The Supreme Court of this State recognized this jurisdiction in the Courts of Probate, and adjudged without question rights which arose out of such sales.

In *McNamee v. Waterbury*, 4 S. C. 156, a case of November Term, 1872, the Supreme Court was called upon to determine whether the Courts of Probate of this State could order the sale of the lands of a decedent in aid of assets, upon proper application by the administrator of an insolvent estate. The court held that the Courts of Probate did possess such power; and the titles of the purchasers at such sale were held to be valid. There was in this case a dissent by Chief Justice Moses; but in neither the opinion of the court nor in the dissenting opinion is there any suggestion of doubt as to the jurisdiction of the Court of Probate in matters of partition; and Chief Justice Moses used expressions which show that he considered the Court of Probate possessed of the jurisdiction theretofore exercised by Courts of Ordinary. It is manifest that if Courts of Probate could exercise jurisdiction to sell land in aid of assets, they could in all cases, when the lands sold for more than sufficient to pay the debts, indirectly accomplish partition among the heirs.

In the subsequent case of *Hancock v. Caskey*, 8 S. C. 282, the

---

April Term, 1882.

---

question was as to the ownership of the growing crop upon lands sold by the Probate Court for partition. The right thus springing wholly out of one of these sales is not questioned, but, on the contrary, the court, in their opinion, speak of the sale as a valid sale, of the parties as bound by the proceedings, and that a party to the cause was estopped from asserting in his own right, or as guardian for his children, any title to the growing crops.

It thus appears that not only the profession at large, and the Probate Courts, but the Circuit Courts and the Supreme Court have all recognized and acted upon a conceded jurisdiction to Courts of Probate in matters of partition. *Communis error facit jus*. Under this conceded and recognized jurisdiction, from 1868 to 1878, thousands of acres of land have been sold in all parts of the State, a vast amount of money invested, conveyances and reconveyances made, titles and rights vested; and innocent purchasers, acting under this common error, shared by legislatures, lawyers and courts, have become involved. I cannot think that the decision in *Davenport v. Caldwell*, 10 S. C. 317, can affect rights thus vested; that it can have any retroactive effect. The question of jurisdiction raised at a late stage of that case in the Supreme Court, as I have been informed, required from that court an examination of the question and a decision; but I am satisfied that the decision there made cannot have any retroactive effect—cannot undo what had been done without question in a vast number of cases in the Probate Courts generally throughout the State, with the sanction of the Circuit Courts and under the recognition of the Supreme Court.

Rights vesting under such circumstances cannot be disturbed by subsequent decisions of a contrary effect. In *Gelpcke v. City of Dubuque*, 1 Wall. 175, the Supreme Court of the United States held that holders of municipal bonds issued under an act of the legislature of Iowa, sustained by the courts of that State, were valid obligations notwithstanding a later decision by the Supreme Court of Iowa, that such act of the legislature was invalid. In delivering the opinion of the court, Mr. Justice Swayne quotes with approval the doctrine in the words of *The Ohio Life and Trust Co. v. Debolt*, 16 How. 432, as follows: "The sound and true rule is, that if the contract when made was

---

Circuit Decree.

---

valid by the laws of the State, as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decisions of its courts altering the construction of the law." This rule is cited at length and approved in the *Bond Debt Cases*, 12 S. C. 282: "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

In *The State, ex relatione Brown, v. The Chester and Lenoir Railroad Company*, 13 S. C. 290, it was held that the county commissioners of York had no power to issue certain railroad aid bonds, but having been issued and their issue approved by the Circuit Court, and the appeal from that decision dismissed by the Supreme Court, that the bonds could not now be affected by the want of authority to issue.

The same rule governs when rights of property and titles to land have become fixed by common acceptance and consent of courts and people. And settled rules cannot be reversed and vested rights disturbed, by a decision of the courts against the correctness of such construction. Such a decision only affects the case under consideration, and establishes a new rule for the future, but does not act retrospectively. I, therefore, think that this sale, having been made prior to the decision in *Davenport v. Caldwell*, should not be affected by that judgment.

The complaint prays that the sales be validated and confirmed, but, as the sales were void, this prayer cannot be granted. Nevertheless, rights may be vested under void sales, and rights have vested under these sales, which should be protected; and every party to the proceedings under which the sales were made is estopped from asserting the invalidity of the sale, or questioning the titles of the purchasers, unless prepared to restore things to the exact status of the day of sale. But this is just what the infant defendants allege cannot be done, because of the inability of their guardians to have the money forthcoming. In no case whatever would equity allow either minors or adults to retain the money and regain the land also. They would alike be estopped in this attempt. The parties to this cause should, therefore, be restrained from hereafter asserting any claim, title

---

April Term, 1882.

---

or interest in or to these lands by reason of any invalidity in the sales made by the Court of Probate.

It is therefore adjudged, that the plaintiff and all the defendants to this cause, the widow and children of the late Dr. John N. Herndon, late of Union county, deceased, be and they are hereby perpetually enjoined and restrained from ever bringing any action or suit to recover the possession of the lands of the said Dr. Herndon, or any tract or tracts or portions thereof, or any interest therein derived by inheritance from the said Dr. John N. Herndon, and from ever asserting any interest therein, or to any share or portion thereof, as distributees of the said Dr. Herndon, so far as the said lands were sold or pretended to be sold under proceedings instituted in the Court of Probate for Union county, in September, 1872, and in a cause entitled *Caroline E. Herndon v. M. L. Moore and others*.

*Mr. David Johnson, Jr., for appellants.*

On the point upon which the judgment of the court is rested, counsel's argument was as follows: The sales are admitted to be void. It is impossible to avoid the conclusion that this is giving to proceedings confessedly void, ending in a sale confessedly void, the essentials of a judgment, and at the same time admitting that the court of probate could render no judgment in actions for partition. In *Davenport v. Caldwell*, we have the first authoritative construction of the section of the constitution conferring jurisdiction upon courts of probate. This construction established no new rule, but declared what had been the law since 1868. Then, the court was without jurisdiction when this sale was made; yet the questions involved have become *res adjudicata*; minors are enjoined from asserting rights divested by a void proceeding. Further, minors represented by a guardian *ad litem*, appointed without authority, whose property has been sold and the proceeds paid over to guardians without warrant of law, are held to be estopped "unless prepared to restore things to the exact status of the day of sale."

With the most profound deference to his Honor, the Circuit judge, it must be said that these conclusions are inconsistent



## Argument for Appellants.

with the principles declared in the authorities cited for their support, and are irreconcilable with the plainest principles of law and equity. [After commenting upon the cases cited in the Circuit decree, the argument proceeded.] With regard to the jurisdiction of the Probate Court, there had been no adjudication up to 1878. This statement of fact destroys every semblance of analogy to the cases cited in the decree. The reason of the rule not existing, the rule has no application.

But, it is said, the jurisdiction was the result of an act of the legislature, was recognized by the courts of the State, and acquiesced in by the people. Can unconstitutional acts of the legislature, and the non-action of courts *sua sponte*, have such an effect upon legal questions that they will become *res adjudicata* to all the State? The acquiescence of the people can have no more effect upon the questions here involved than the acts of the lynchers of Judy Metts upon the criminal law of the country. The rule in *Gelpcke v. City of Dubuque*, rests upon solemn decisions of a court of last resort in relation to contracts. The decree here rests upon the non-action of courts and the consent of the people. In the one case, the court of last resort declared in favor of the power to contract, and the bonds were negotiated with reference to that decision. In the other case, the court of last resort declared against the power the first time its power was invoked.

If this case is to be determined by the principles of the law of contract, then the rule is as laid down in the *Bond Debt Cases*, 12 S. C. 277, that bonds issued by the legislature without authority are void. It does not conflict with the rule declared in *Gelpcke v. Dubuque*, and rests upon the same broad principle that declares the act of a court without jurisdiction of the subject matter of the action absolutely and incurably void. The rule contended for should apply with peculiar force in cases involving the rights of minors. The magnitude of the interests that may be affected, the hardships that may result indirectly from the decision, cannot affect the conclusion. It is a question of legal science which must be determined by the application of the universal principles of that science. Mr. Justice Story (2 *Sumner* 354) says: "It is not for courts of justice to provide for all the defects or mis-

---

April Term, 1882.

---

chiefs of imperfect legislation." And in his *Conf. L.* 17, he says: "Arguments drawn from impolicy or inconvenience ought to have but little weight. The only sound principle is to declare *ita lex scripta est*—to follow and obey."

*Mr. R. R. Rawls*, same side.

*Mr. R. W. Shand*, contra.

January 9th, 1883. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. Dr. John N. Herndon, of Union, died intestate in March, 1872, possessed of considerable real and personal property, leaving surviving him, as distributees, his widow, Caroline E. Herndon, the plaintiff, and six children, viz., the defendants, Mrs. Mary L. Moore, Blanche Herndon, Addie Herndon, Eliza Herndon, John Herndon and Cornelia Herndon. Soon after his death (1872) the plaintiff, his widow, instituted proceedings in the Court of Probate for Union county, against the other distributees, to partition the lands of the estate, considerable in extent and value, and lying in the counties of Union, Newberry and Laurens. Blanche, Addie, Eliza, John and Cornelia, were minors, represented by guardians *ad litem*, and the proceedings in all other respects were regular and formal. The Probate judge, to effect partition, granted order of sale, and the lands were sold, those in Union for \$12,866, those in Newberry for \$32,859, and those in Laurens for \$1,475; aggregating the sum of \$47,200. The purchasers complied with the terms of sale and received titles. The purchase-money of the lands was also paid and distributed among the parties, and the business nearly ended. The lands brought full value.

Matters stood in this condition for six years, until 1878, when this court filed its judgment in the case of *Davenport v. Caldwell*, 10 S. C. 317, which declared that the act of the legislature, giving to the Probate Court jurisdiction to partition lands, was unconstitutional and void. In November, 1879, the plaintiff, Caroline E. Herndon (who had also been plaintiff in the proceedings before the Probate Court), fearing that some of the parties, in consequence of that decision, might make an effort to

## Opinion of the Court.

disturb the proceedings had, as stated, in the Probate Court, instituted this action in the Court of Common Pleas, against the other distributees, to validate that proceeding in the Probate Court, and quiet the titles thereunder, and to restrain and perpetually enjoin each and all of the distributees from prosecuting any action for the recovery of the lands, or any part of them, or any interest therein under a claim by inheritance from Dr. John N. Herndon, deceased.

The adult defendants interposed no objections. The defendant Addie, a minor at the time the action was brought, has since attained her majority, and, by her answer, joins in the prayer of the complaint. The infants Eliza and Cornelia, answer by their guardian *ad litem*, David Johnson, Esq., and the infant John answers by his guardian *ad litem*, R. R. Rawls, Esq., and object to the confirmation prayed for. The clerk of the court as referee took the testimony, and reported the record of the proceedings in the Probate Court, that nearly all the purchase-money had been paid into the office of the judge of Probate according to the terms of sale, and by him paid out to the distributees respectively; that the shares of the infant distributees were paid to their guardians, duly appointed; that all the guardianship bonds were good at the time they were taken; that the bonds of the guardians of Blanche and Addie are still good; that the bond of the guardian of Eliza is not good for the amount of the penalty, and that the bonds of the guardians of John and Cornelia are worthless and not good for any amount.

The case came on to be heard before Judge Hudson, who held that the sales under the proceedings in the Probate Court, having been made prior to the decision in *Davenport v. Caldwell*, should not be affected by that judgment, and that all the parties "to the proceedings under which the sales were made are estopped from asserting the invalidity of the sale or questioning the titles of the purchasers, unless prepared to restore things to the exact status of the day of sale, \* \* \* in no case whatever would equity allow either minors or adults to retain the money and regain the land also. They would alike be estopped in this attempt. The parties to the cause should therefore be restrained from hereafter asserting any claim, title or interest in

---

April Term, 1882.

---

or to these lands by reason of any invalidity in the sales by the Court of Probate," &c.

From this decree the minors Eliza, Cornelia and John appeal to this court upon the following exceptions:

1. "Because his Honor decides 'That the case discloses an equity in the plaintiff which entitles her, as against her co-distributees, to a part of the relief which she demands.'

2. "Because his Honor decides 'That it would be giving retro-active effect to the decision in the cause of *Davenport v. Caldwell*, 10 S. C. 317, to refuse the perpetual injunction prayed for.'

3. "Because his Honor decides 'That every party to the proceedings under which the sales were made is estopped from asserting the invalidity of the sale or questioning the titles of the purchasers, unless prepared to restore things to the exact status of the day of sale.'

4. "Because his Honor should have decided that the plaintiff had no cause of action against the defendants.

5. "Because his Honor should have decided that inasmuch as the Court of Probate was without jurisdiction of the subject-matter of the action for the partition or sale of the real estate of Dr. John N. Herndon, that said sale was a nullity so far as rights of the infants in said real estate were concerned, and that the receipt by the Court of Probate of the infants' distributive share of the proceeds of said sale, and payment thereof to the general guardian of said infants, was without authority of law, could not operate as an estoppel, and divested no rights of said infants in the real estate sold.

6. "Because his Honor decides 'That because of the common error as to the jurisdiction of the Court of Probate in actions for partition of real estate, participated in by the lawyers, legislature and the courts of the State, the rights of purchasers at said sales anterior to the decision of the Supreme Court in the case of *Davenport v. Caldwell* are as full, and the titles to property purchased at said sales are as perfect, as they would be if there had been no lack of jurisdiction in the court making the sale.'"

This action having been brought in the Court of Common Pleas to validate certain proceedings previously had in a court

---

Opinion of the Court.

---

of limited jurisdiction alleged to be void, and to enjoin all the parties, plaintiffs and defendants from claiming title or interest in certain lands sold or conveyed, under the orders of that court, in a proceeding in which the identical parties were before it, we agree with the Circuit judge that it would have been more regular if the purchasers under the order of said court, whose titles are substantially in issue, had been made parties, but as the appellants declare "a desire to have an authentic decision of the court of last resort as to the effect of a Probate Court sale in partition proceedings upon the rights of minors," we do not feel called upon to order the case back to the Circuit in order that additional parties may be made. We assume that the purchasers are desirous of retaining the lands purchased by them and proceed to consider the case.

Besides the case itself, the question involved is one not only of novel impression but of great importance, affecting as it does titles to thousands of acres of land purchased *bona fide* by innocent parties without notice, on the faith of the orders of the Probate Court, made in conformity with the express terms of an act of the legislature, the opinion of the courts and a practice well nigh universal. Under these circumstances the court ordered a re-argument of the case, and in doing so gave permission of the counsel to examine the grounds upon which the case of *Davenport v. Caldwell* was rested, and the extent to which the judgment as an authority must necessarily go. Exhaustive arguments have been made here upon the subject, and, in order that the law may be regarded as no longer in doubt, we will preface the judgment we are about to render by a few observations upon that case and the circumstances under which it was decided.

Under our old law the ordinary had jurisdiction to partition real estate not exceeding in value \$1,000. The constitution of 1868 abolished the old Court of Equity, and made a new division of judicial powers. It created the Probate Court, giving it generally the jurisdiction of the old Court of Ordinary and also additional powers, but without expressly naming the power to partition lands even to the extent of \$1,000. Upon the subject of partition, as a distinct matter of jurisdiction, it is entirely silent. The provision is in these words (Art. IV., § 20): "A

---

April Term, 1882.

---

Court of Probate shall be established in each county, with jurisdiction in all matters testamentary and of administration, in business appertaining to minors and the allotment of dower in cases of idiocy and lunacy, and persons *non compotes mentis*," &c.

Soon after the adoption of the constitution, and to a large extent by the persons who framed it, the legislature, in 1868, passed an act "To define the jurisdiction and regulate the practice of Probate Courts," which, among other things, provided that "every judge of Probate, in his county, shall have jurisdiction in all matters testamentary and of administration, in business appertaining to minors and lunacy and persons *non compotes mentis*. \* \* \* He may exercise jurisdiction of all petitions for partition of real estate when no dispute exists in relation to the title thereof; and when the title to such real estate is disputed, he shall refer the same to the Circuit Court for adjudication, unless the parties shall consent to his determination of the same," &c. 14 Stat. 77.

This express grant of jurisdiction contained in the act was exercised by the different Probate Courts, and lands in all parts of the State were without question partitioned under it until 1878, when, as stated, the judgment of this court was filed in the case of *Davenport v. Caldwell, supra*. That was a petition in the Probate Court of Abbeville county to partition lands of an intestate between two adults as heirs-at-law of one Caldwell. The precise question was whether the petitioner, Katie Davenport, a person of color, born of slave parents before emancipation, and who were dead before that event, was legally the sister and heir of the intestate, and as such entitled to a share of his lands, and, if so, she prayed partition of a tract of land of the intestate. The judge of Probate decided that the petitioner was an heir-at-law under the statute of distributions, and, as a consequence, issued orders to partition the land between the widow and sister. The Circuit Court affirmed this judgment, and upon appeal this court also affirmed the judgment upon the point of heirship, but denied petitioner's right to partition upon the ground that the Probate Court had no jurisdiction to partition lands. The court say "the Court of Probate is unquestionably a court of inferior and limited jurisdiction, and, looking to the constitution for the

---

Opinion of the Court.

---

limits of the jurisdiction of the court, we find the limits defined in section 20, article IV., and, as there defined, cases for the partition of real estate are not embraced," and ordered that "the judgment of the Circuit Court be reversed, and the case remanded with instructions that the proceedings in the Court of Probate be dismissed, so far as they relate to partition of real estate."

It appears that there were no minors interested in the case, and the question in that aspect could not have been considered. Indeed, there seems to have been very little argument at the bar on the subject of the constitutionality of the act conferring the jurisdiction, but the question was made in the brief, and the judgment furnishes evidence that the case, at least upon some of the points involved, was fully considered by the court. The constitutional point being in the record, the court held the general proposition without qualifications that the act of the legislature, purporting to give the Probate Court jurisdiction in the partition of lands, was unauthorized by the constitution and void. There were other questions in the case which were, as stated, elaborately considered, but this one also was distinctly decided. The judgment proceeded on the ground that the section of the constitution conferring jurisdiction upon the Probate Court was exhaustive in its character, and inhibited the legislature from adding thereto.

If the question were still open, we are not prepared to say that the judgment was erroneous. There are several obvious points of difference in the circumstances of that case, and those in *Pelzer, Rodgers & Co. v. Campbell & Co.*, 15 S. C. 581, cited at the bar, which gives a different construction to what is called the "married woman's clause" of the constitution. Influenced by these considerations, and a strong sense of the importance of preserving uniformity and consistency in the interpretation of the laws, we will not re-open the argument involved in the case, but stand upon the principle of *stare decisis*.

It is true there were no minors interested in the case, but we see nothing in our law to sustain the view that the legislature, without regard to the limited jurisdiction given to the Probate Court, has the right as *parens patriæ*, without a case made, to authorize the judge of Probate to sell or partition the property

---

April Term, 1882.

---

of one not *sui juris*. The constitution divided the functions of government into the legislative, executive and judicial, and it is the fundamental theory of our system that the departments shall be kept separate, and each in its own sphere, independent of the others. The power claimed to exist, especially when the property of the person to be sold is owned in common with others, is clearly judicial in its character, and all judicial power has been taken away from the legislature and deposited in the courts of the State, created or to be created. Besides, if such power did exist in the legislature, it is plain that the act in question was not intended to be the exercise of such power, but a general law manifestly intended to confer jurisdiction in a particular matter upon a court already in existence. *Cooley Const. Lim.* 97, 98.

It seems to us also that we cannot derive the jurisdiction from the words of the constitution in "all matters testamentary and of administration." By these words nothing more was meant, as we suppose, than matters appertaining to proceedings in an Orphans' Court, in supervising and directing executors and administrators in the discharge of their duties. This would seem to be the ordinary meaning of the words, not as conferring jurisdiction in any particular matter, but rather indicating the character of matters properly belonging to that court. Where there are no debts of an intestate, parties interested in his lands may take by partition their shares of the land itself in severalty, without sale, and we can hardly suppose that the most liberal construction of the words "matters of administration" would include such a proceeding. What are matters of administration must be determined by the laws of the State, existing at the time the language in question was introduced into the constitution. The object of administration is to pay the debts of the deceased, and distribute his personal estate among those entitled to it, and any act that may properly be performed by an administrator looking to this end, is a matter of administration. *McNamee v. Waterbury*, 4 S. C. 155.

Nor can we say that the words in the constitution granting jurisdiction to the Probate Court "in business appertaining to minors" gives to that court the right to partition land *quoad* the interest of minors. "Jurisdiction of the subject matter is a



---

Opinion of the Court.

---

condition precedent to the acquisition of authority over the parties, and is conferred by the authority which organizes the court and is sought for in the general nature of its powers, or in authority specially conferred." *Freem. Judg.*, § 119. It seems to us that jurisdiction of a subject matter given to a court must be an entirety, and cannot be given in part only, to be determined by the ages of the respective parties who may be interested. It is true that the words "in business appertaining to minors" seem very general and comprehensive, but taken altogether they can hardly mean more than "business peculiar to minors." Otherwise any case upon any subject in which minors happened to be interested, would be, to that extent, carried into the Probate Court, which division of cases would necessarily lead to inextricable confusion.

Assuming, then, that the decision in *Davenport v. Caldwell* must stand without limitation or qualification as to infants, as well as to adults, what then must be the effect of it upon the proceedings in the case of *Herndon v. Moore*, which had been instituted in the Probate Court and nearly ended long before that judgment was filed? Does it follow that the innocent purchasers at the sale ordered by the Probate Court in the *Herndon* case, who purchased in good faith and paid for lands sold under proceedings expressly authorized by a law standing upon the statute book, must be required to yield up their lands to be again partitioned? We cannot accept a conclusion which would open up such a prolific source of litigation and result in such flagrant injustice.

In the first place there can be no doubt that all persons of full age, who were parties to the proceedings of *Herndon v. Moore* in the Probate Court, are estopped from denying the validity of those proceedings. When land descends to heirs upon the death of an intestate, they become the legal owners as coparceners and may enjoy it in common, or divide it among themselves, or they may go into the courts provided by law for that purpose. When they choose to do the latter, they select the court and its officers as the instrumentality through which to effect partition, and they are bound by the acts of that court, as in one sense their agent. *Commissioner v. Thomson*, 4 *McC.* 434. Whether that court had constitutional jurisdiction or not, they consented to its pro-

---

April Term, 1882.

---

ceedings. They held it out as authorized to act in the matter for them, they did not appeal from its order of sale, and they are estopped from claiming against their own sales made in this way for the purpose of partition. "If lands be sold at a partition or other Chancery sale, no co-tenant who has claimed and received his share of the proceeds, can deny the validity of the partition." *Freeman Void J. S.* § 48; *Story Eq. Jur.* 387; *McNish v. Guerard*, 4 *Strob. Eq.* 76.

So far as the adult parties are concerned there can be no doubt that the purchasers are entitled to hold the land. It may be true that in this view they do not get title. It is not the office of an estoppel to pass the title, which remains unaffected, but it cannot be asserted against the party who acted upon the faith of the representations which created the estoppel. *Big. Estop.* 450.

It is, however, strongly urged upon us that the result must be different as to the minors, Eliza, Cornelia and John, who, being under the disability of infancy, could do no act, either in going into the Probate Court or in confirming the sales afterwards.

Estoppel *in pais* ordinarily is based upon the conduct of parties, and as minors are incapable of responsible action, it would seem to follow that as a general rule the doctrine of technical estoppel has no application to them. This rule, however, is not without exceptions. Minors, of age of discretion, are certainly liable *ex delicto* for fraudulent misrepresentations as to title, and in such case, to prevent circuitry of action, the court will in the first instance charge the land in favor of the purchaser with the amount of the purchase-money. *Big. Estop.* 448. It is, however, unnecessary to pursue this view, as it is not claimed that any such representations were made by the minors in this case.

But a higher right is invoked in behalf of the purchasers, which, under the circumstances of the case, we think they are entitled to. This does not rest upon any theory of confirmation by the parties, but upon the fact that the purchasers bought *bona fide* at a sale judicial in form, at the time believed to be valid, and paid the purchase-money for the land thus purchased. It is urged that the sale for partition by the Probate Court in the case of Herndon, having been made prior to the decision in

## Opinion of the Court.

*Davenport v. Caldwell*, and while the jurisdiction of the Probate Court was generally recognized, should not be affected by that judgment. Certainly the judgment in that case only bound the parties before the court, but a decision of the Supreme Court upon a constitutional question, not only affects the case before the court, but stands as an authoritative construction of the clause interpreted, and, as a general rule, is conclusive upon other cases involving the same question.

This is certainly true of all cases arising after the decision. And although in its effect upon cases decided before, there may be something of the element which makes *ex post facto* laws so objectionable, yet there is undoubtedly a difference in effect between repealing a valid law, and declaring that one in form never was law. In the former case all acts done and rights vested under the law before its repeal, will be maintained, while in the latter the declaration of its unconstitutionality ordinarily reaches back to the date of the act itself. But there is an exception as to a class of cases in which, for sufficient reasons, the declaration of the unconstitutionality of a law is not allowed to have greater effect than a simple repeal sustaining all acts done and all judicial proceedings had under it before such declaration, in analogy to the principle of *res adjudicata*.

In such case, rights acquired under an act having the form of law, are sustained, although the act be afterwards declared unconstitutional upon the principle involved in the maxim *communis error facit jus*. This proceeds upon the view that to annul everything done under an act solemnly passed by the law-making power of the State, generally received as valid and so expounded and administered by courts of justice, would operate as a fraud upon the parties thus misled. This doctrine, although exceptional in character, is well sustained by authority. Mr. Wharton, in his law of evidence, section 1242, says: "It should also be kept in mind that there are cases in which *communis error facit jus*, and in which therefore the courts will sanction a prevalent construction which is erroneous, rather than disturb titles which have been settled under such construction."

Perhaps the leading case upon the subject in this country is that of *Gelpcke v. City of Dubuque*, 1 Wall. 175. It appears in

---

April Term, 1882.

---

that case that the legislature of Iowa passed a law authorizing the city of Dubuque to aid in the construction of a certain railroad by issuing bonds in pursuance of a vote of the citizens of the city. The Supreme Court of the State decided that the legislature had the right to authorize municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly. During the time the law was thus expounded, bonds were issued upon the faith of it. Afterwards, the Supreme Court of the State decided that the legislature had no such power. It was held by the Supreme Court of the United States that the latest decision, declaring the act unconstitutional, did not affect rights which had been acquired before its rendition, thus giving the judgment the effect only of the repeal of a valid law. In delivering the judgment of the court, Mr. Justice Swayne said: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. The sound and true rule is that if the contract, when made, was valid by the law of the State, as then expounded by all departments of the government, and administered in the courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decisions of its courts altering the construction of the law. *Ohio Life and Trust Co. v. Debolt*, 16 How. 432."

The same principle applies where there is a change of judicial decisions as to the constitutional power of the legislature to enact the law. It rests upon the plainest principles of justice. "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." This principle has been incidentally recognized in our State in the *Bond Debt Cases*, 12 S. C. 282, and also in the case, *State, ex rel. Brown, v. C. and L. R. R. Co.*, 13 S. C. 291. In the *Bond Debt Cases*, Mr. Justice McIver, in delivering the judgment of the court, said: "This rule was again affirmed in the case of *Lee Co. v. Rodgers*, 7 Wall. 181, and the question was there said not to be open for re-examination in the Supreme Court of the United States. It is perfectly manifest, therefore, that even were we to overrule the case of *Morton, Bliss & Co. v. The Comptroller-General*, it would not help the case of the State, in view of the rule thus

## Opinion of the Court.

firmly established (whether correctly or not we are not called upon to say) in the tribunal of last resort."

In England they have no written instrument which embodies in form the fundamental law, but the doctrine has always been recognized there, especially in reference to conveyances of real estate. In *Broom Max.* 141, under the head of *communis error facit jus*, it is said: "The law so favors the public good that it will in some cases permit a common error to pass for right, as an instance of which may be mentioned the case of common recoveries, which were fictitious proceedings introduced by a kind of *pia fraus* to elude the statute *de donis*, and which were yet allowed by the courts to be a bar to an estate tail, so that these recoveries, however clandestinely introduced, became by long usage and acquiescence a most common assurance of lands, and were looked upon as the legal mode of conveyance, whereby tenant in tail might dispose of lands and tenements."

In *Jones v. Tapling*, 12 Com. B. (N. S.) 846, Mr. Justice Blackburn said: "There are cases in which a decision originally erroneously has been so long acquiesced in and acted on, that a return to the proper principle would greatly affect existing interests. This is peculiarly the case in questions of conveyancing lands. There the maxim applies, *communis error facit jus*."

In *Regina v. Sussex*, 2 Best & S. 680, the same judge said: "I think there are cases in which a mistaken notion of the law has, no matter why, become so generally accepted by and acted upon as to render it probable that business has been regulated, and the position of the parties altered in consequence; and in such cases we may hold that the general acceptance of the mistake has made that law which was originally error."

In the case of *Isherwood v. Olknow*, 3 M. & S. 396, (54 Geo. III.,) Lord Ellenborough said: "It has sometimes been said *communis error facit jus*, but I say *communis opinio* is evidence of what the law is, not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been the groundwork and substratum of practice."

In the great case in the House of Lords of *Phipps v. Ackers*, 9 Cl. & F. 598, Lord Brougham said: "The courts and even this house have frequently proceeded upon this principle, and

---

April Term, 1882.

---

have sanctioned what even plainly appeared to be erroneous principles introduced and long assumed as law, rather than occasion the great inconvenience that must arise from correcting the common error and recurring to more accurate views."

All the cases which admit the principle at the same time declare that it is exceptional and should be applied with the greatest care. Do the facts of this case fairly bring it within the rule as announced by Lord Ellenborough, that it is not enough that the erroneous opinion be merely speculative and floating in the mind, but must furnish "the groundwork and substratum of practice." We cannot resist the conclusion that the facts here make such a case. The partition sale ordered was in no sense tortious, and it would operate as a fraud upon innocent parties to vacate the titles acquired under proceedings in the Probate Court, established by authority of the State, and the parties thereby invited to use it for the purpose of partition. The legislature at its first session after the adoption of the constitution, on September 21st, 1868, passed "An act to define the jurisdiction and regulate the practice of the Probate Court," by which jurisdiction was expressly given to that court to partition lands. This might well be considered as a contemporaneous construction of the constitution. This act was re-affirmed in the code of 1870, and re-enacted again in the general statutes in 1872.

For more than ten years, until November, 1878, when *Davenport v. Caldwell* was decided, it was generally accepted as the undoubted law of the State. The jurisdiction was exercised without challenge, and a great number of cases were instituted in that court and thousands of acres of land sold in all parts of the State. As Judge Hudson says: "Lawyers in all parts of the State acted under it, Courts of Probate exercised this jurisdiction unchallenged, and the Circuit Courts recognized it and adjudged questions arising from such proceedings." The truth is that all parties acted in good faith and were misled. According to our view, the proceedings for partition of Herndon's estate, regularly had in the Probate Court, prior to the decision of *Davenport v. Caldwell*, should be held binding upon all the parties concerned.

---

Opinion of the Court.

---

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Chief Justice SIMPSON and Associate Justice McIVER concurred in the result.

---

SCHUMPERT v. SMITH.

The decision of this court in the case of *Herndon v. Moore*, *ante* p. 339, approved.

This case was heard in connection with the case of *Herndon v. Moore*, *ante* p. 339, and involved the same questions. The opinion fully states the case.

*Messrs. Moorman & Simkins, J. Y. Culbreath*, for appellants.

*Messrs. Jones & Jones*, contra.

January 9th, 1883. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. This case was heard in connection with that of *Herndon v. Moore*, just decided, *ante* p. 339. That was an action to validate proceedings in partition before a Probate Court, and this is the counterpart of it—to ignore entirely such proceedings as void and partition the lands anew—but the principles announced in that case must be conclusive of this, except in so far as the facts may differ.

The facts of this case are as follows: Elisha K. Schumpert, of Newberry, died intestate, leaving distributees—a widow, Mattie, now the wife of Smith, and children, William F. Schumpert, Harriet M. Moseley, Beauregard S. Schumpert, John E. Schumpert, Franklin E. Schumpert, Frederick L. Schumpert and James C. Schumpert. Some of these are minors, but which does not appear. The intestate died seized and possessed of lands, and it seems that it is probable the personal assets will not be sufficient to pay the debts of his estate.

---

April Term, 1882.

---

However that may be, the appellant, William F. Schumpert, filed a petition in the Probate Court of Newberry county, to partition the lands among the distributees, of whom he was one. In order to effect partition, the judge of Probate ordered the lands sold, and accordingly they were sold on sales day in November, 1878, in three separate tracts, upon the terms one-third cash and the remainder in two equal annual installments, secured by bond and mortgage of the premises sold. The plaintiff bid off tract No. 1, Benjamin F. Nickols took No. 2, and Brown & Moseley No. 3. Brown & Moseley and Nichols, respectively, complied with the terms of sale, paid the cash installment into the Probate Court, and were let into the possession of the lands purchased by them. William F. Schumpert did not comply with the terms of sale as to the tract of land purchased by him.

The matter stood in this condition when this court decided the case of *Davenport v. Caldwell*, 10 S. C. 317, holding that the act of the legislature passed in September, 1868, purporting to give to the Probate Court jurisdiction to partition lands, was unconstitutional and void. Whereupon, in September, 1879, William F. Schumpert, the plaintiff, who had been the actor also in the Probate proceedings, instituted this action in the Court of Common Pleas, to partition the lands anew, simply reciting the former proceedings before the Probate Court, and proposing to ignore and disregard them as absolutely void. The heirs, as well as the administrator of the intestate, were made parties, as also the purchasers at the Probate sales. The widow, Mattie (now Smith), answered, concurring in the prayer of the complaint for a new partition. The guardian *ad litem* of the infant defendants submitted their rights, and the purchaser, Nickols, resisted the new partition and insisted that he should not be disturbed in the possession of lands which he had purchased *bona fide* at a judicial sale for full value, and had paid the purchase-money and made improvements thereon.

The case was heard by Judge Wallace, who ordered the complaint to be dismissed. From this order William F. Schumpert and Mrs. Smith, and the infant defendants, by their guardian, James Y. Culbreath, Esq., appeal to this court upon the follow-



---

Syllabus.

---

ing ground: "Because the presiding judge erred in dismissing the complaint for the reason, as he stated, that the sale of the land made by the Probate judge was a good and valid sale, as shown by the facts set forth in the pleadings."

This court has just held, in the case of *Herndon v. Moore*, *ante* p. 339, "that proceedings for partition regularly had in the Probate Court prior to November 27th, 1878, when the judgment in the case of *Davenport v. Caldwell* was filed, should be held binding upon all the parties concerned." That judgment is conclusive of this case, and reference is made to it, without repeating here the grounds upon which it was placed.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Chief Justice SIMPSON and Associate Justice McIVER concurred in the result.

---

O'NEILL v. O'NEILL.

An unpaid due bill signed by a decedent in favor of another and found among his papers after his death, is not of itself sufficient to establish an existing legal obligation. But where coupled with confidential communications by decedent to his brother and executor, made orally just before his death and contained in a letter found in his private box after death, stating that it represented an amount of money belonging to the payees of the due bill "misaid or mismanaged" by decedent while their confidential agent, and which he thereby instructed his brother and executor to pay in some private manner, the due bill will be sustained as evidence of a debt due by the decedent to the payees.

---

Before KERSHAW, J., Charleston, June, 1881.

The facts of this case are all stated in the opinion. Upon these facts W. D. Clancy, Esq., master, to whom the case had been referred for inquiry and report, reported as follows:

The character of the paper found in the tin box of Edward O'Neill, addressed to his brother (Dennis O'Neill), and containing a due bill in favor of Douglass, Jackson & Pickett for fifteen

---

April Term, 1882.

---

hundred dollars, not delivered to them in the life-time of the testator, is not such an obligation to pay money as will warrant the executor in paying this sum as a legally established claim against the estate of the testator. The will of Edward O'Neill must be regarded as the voice of the dead man speaking as to all dispositions to be made of his estate, and any other paper lacking the formality required by law, however solemn its moral import, is, as a legal paper, null and void. The executor in this case gave public notice, calling upon persons having claims against the estate of Edward O'Neill to come in and establish the same. It does not appear that Douglass, Jackson & Pickett made any claim as creditors, nor is it surprising that they did not from the nature of O'Neill's letter.

Jackson and Pickett, survivors of Douglass, Jackson & Pickett, excepted to this report. Upon this exception the circuit decree was as follows :

There can be no doubt that in some manner, known only to the deceased, he was indebted to Douglass, Jackson & Pickett, in this amount; that the obligation to pay it pressed on his conscience, and that discharging himself of the obligation by payment of the money, he wished to conceal from the parties all knowledge of his connection with the money so paid. It is not possible to discover that secret, which he carried with him to the grave. It is not necessary that it should be known. His confession of his indebtedness is the highest evidence that can be given of the fact that he owed this money to these parties, and that he died in the expectation that they would receive it. If it has so happened that the secrecy he so much desired has not been secured, that does not affect the question of fact of his indebtedness. Of that, there cannot be a doubt; the evidence establishes the fact of the indebtedness of the testator to Douglass, Jackson & Pickett, for the sum of fifteen hundred dollars, and the exception of the parties to the report of the master on this point is sustained, and the report as to this overruled.

\* \* \* It is therefore ordered and decreed, that Douglass, Jackson & Pickett be entitled to receive from the assets of Edward O'Neill in the hands of the plaintiff, as his executor, the sum of fifteen hundred dollars, with interest from May 26th,

---

Opinion of the Court.

---

1879, the date of the written admission of indebtedness; and to have execution therefor, if not paid by the plaintiff; and that the costs of the case be paid from the assets of the testator in the hands of the executor, &c.

From this decree, Mrs. Catherine O'Neill appealed upon five exceptions. The first is immaterial; the others were as follows:

2. Because the Circuit Judge erred in holding that the "letter and due bill" signed by the testator, and found in his private box after his decease, but which had never been delivered to any one in his life-time, were evidence of the fact that the said Edward O'Neill was indebted to Douglass, Jackson & Pickett, at the time of his decease, in the sum of fifteen hundred dollars.

3. Because the Circuit Judge erred in not holding as matter of law that the *onus* was on Douglass, Jackson & Pickett to show affirmatively that the testator was indebted to them, at the time of his decease, in the sum of fifteen hundred dollars; and further, in not finding that the evidence established simply, that prior to his death the testator imagined that he was indebted to them by reason of some supposed mismanagement or want of care in respect to the moneys which had come into his hands as their agent.

4. Because the Circuit Judge erred in decreeing that Douglass, Jackson & Pickett were "entitled to receive from the assets of Edward O'Neill, in the hands of the plaintiff, as his executor, the sum of fifteen hundred dollars, with interest from May 26th, 1879."

5. Because the Circuit Judge erred in admitting as evidence the statements made by the testator to the plaintiff, Dennis O'Neill.

*Messrs. Hayne & Ficken*, for appellant.

*Mr. A. G. Magrath*, contra.

January 9th, 1883. The opinion of the court was delivered by

MR. JUSTICE McIVER. The sole question raised by this appeal is whether the estate of the testator, Edward O'Neill, is

---

April Term, 1882.

---

liable to pay the survivors of Douglass, Jackson & Pickett a certain alleged debt, for at the argument here the last ground of appeal was abandoned.

The circumstances which gave rise to this claim are peculiar, and may be stated as follows: Edward O'Neill had been for many years in the employment of Douglass, Jackson & Pickett, proprietors of extensive livery stables in the city of Charleston, and had eventually become their confidential clerk and general manager. In 1879 his health began to fail, and, being about to remove to Summerville, he made a confidential communication to his brother Dennis, the plaintiff in this case, which was testified to by Dennis at the hearing before the master, in the following words: "My brother told me, when his health was failing, and when he was about to go to Summerville, that I would find instructions in a letter, in his tin box, what to do in reference to a certain sum of money mismanaged or mislaid during the time when he was in the employment of Douglass, Jackson & Pickett."

The testator died June 27th, 1879, leaving a will dated May 20th, 1879, whereby he appointed his brother Dennis executor, and guardian of his child or children, and, after providing for the payment of all his just debts and funeral expenses, devised and bequeathed his whole estate to his wife, for life, or during widowhood, with remainder to his child or children. The will was duly admitted to probate, the executor qualified and published the usual notice to creditors to present their demands, but no claim was presented by Douglass, Jackson & Pickett, for the reason, as they allege, that they did not then know of any indebtedness on the part of the testator to them. The executor having procured the key of the tin box above referred to, from the testator's house, repaired to the office of the judge of probate in company with the counsel of the widow, where the tin box, which had been obtained from the safe of Douglass, Jackson & Pickett, where the testator was in the habit of keeping it, was opened and found to contain, amongst other things, the will of the testator, and a sealed envelope, addressed "Dennis O'Neill, private," upon which was the following endorsement: "Don't

---

Opinion of the Court.

---

open this as long E. O'N. is living." The envelope, when opened, was found to contain the following letter :

"Dear Brother—Pay the amount over to Douglass, Jackson & Pickett, when Wm. Jackson pays you over five thousand dollars. Send it to them by express, so they will not be able to find out who sent it. It will be all right as long as they get the money. This is as near as I can come to the amount. Ask them to forgive me if it is any more. Your B., E. O'Neill. May 26th, 1879."

On the opposite page of the same sheet of paper upon which this letter was written, is the following :

"CHARLESTON, S. C., May, 1879.

"Due Douglass, Jackson & Pickett, fifteen hundred dollars for value received.

"\$1,500.

E. O'NEILL."

The executor having instituted proceedings for the settlement of the estate of his testator, brought to the attention of the court this claim in favor of Douglass, Jackson & Pickett, to the payment of which the widow objected upon the ground that the claim was not a legal one, whereupon the survivors of Douglass, Jackson & Pickett intervened by petition and asked to have the claim paid.

There is no other evidence in support of the claim, except that above stated, and the question for us to determine is whether this evidence is sufficient to establish the claim. The mere fact that the testator signed a paper in the form of a due bill, acknowledging himself indebted to Douglass, Jackson & Pickett in the sum of \$1,500, is certainly not of itself sufficient, for the so-called due bill was never delivered. 1 *Dan. Neg. Inst.*, § 63. But the question is whether this, taken in connection with the other evidence, may not be sufficient to establish the legality of the claim. The reason why a paper in the form of a note constitutes no evidence of indebtedness until it is delivered, is because the transaction is inchoate as long as the paper remains

---

April Term, 1882.

---

in the possession of the maker, and, at most, only furnishes evidence of an intention to give the note, which may or may not ripen into an act. Until it is delivered, it is entirely under the control of the maker and may be destroyed or canceled by him. It cannot by itself even be regarded as an admission of liability, for, until it is delivered, or until the maker does some irrevocable act showing an intention to deliver, it is simply an admission to himself and amounts to no admission at all. But where a person, after signing such a paper, retains it in his possession, and does other acts or makes other declarations, showing that the retention of possession was not for the purpose of enabling him to destroy or cancel it, in case he should change his mind, but for another and different purpose, entirely consistent with the idea that the paper was regarded by him as the evidence of an absolute, binding contract, constituting a valid obligation, then it seems to us that such a paper may be regarded as furnishing evidence of a legal liability.

There cannot be a doubt, from the evidence in this case, that the testator thought that he was indebted to Douglass, Jackson & Pickett, and that such liability grew out of the fact that while he was in the employment of that firm, he had so improperly "mismanaged or mislaid" some of their money as to make him liable for the same, and that he displayed extreme anxiety to keep this a secret, especially from his employers. This conclusively shows that his sole purpose in retaining possession of the paper in the form of a due bill was to conceal the facts which gave rise to the indebtedness, and not for the purpose of enabling him to cancel the evidence of such indebtedness, or to recall the admission contained in the paper. His declaration to his brother before his death, was an implied admission that he was liable to make good the loss resulting from his mismanagement, the particulars of which were known only to himself; and this, coupled with his written instructions to his brother as to how he wished the loss repaired, cannot be construed in any other light than as an admission of liability and a promise to pay the same, and then the written memorandum in the form of a due bill indicated the amount for which he admitted his liability.

---

Syllabus.

---

The whole evidence, taken together, amounts to the same thing as if he had said to his brother, "While I was in the employment of Douglass, Jackson & Pickett, I so mismanaged their funds as to make me liable to them in a sum which you will find stated in a paper in the form of a due bill in my tin box; and this amount I wish you to pay them in such a way that they may not know from whom it comes." If he had said this, could any one doubt that the evidence would be sufficient to establish the legality of the claim?

Suppose he had said to his brother: "I owe the estate of a neighbor, who has recently died, a sum of money, which I borrowed from him shortly before his death, under circumstances that I do not wish disclosed, but gave him no note or other evidence of such indebtedness, and I wish you to pay the debt in such a way as that it may not be known from whom it comes, and you will find the amount stated in a memorandum amongst my private papers." Such a declaration, whether made orally or in writing, would not be testamentary in its character, but would be simply furnishing the evidence of an indebtedness incurred during his life-time. So, here, the indebtedness of the testator to Douglass, Jackson & Pickett arose during his life-time, but he did not choose to let any one have access to the evidence of such indebtedness until after his death, and, therefore, took care to let his brother, whom he had selected as his executor, know where such evidence could be obtained after his death.

We agree, therefore, with the Circuit judge, that the evidence adduced was sufficient to establish the claim set up by the survivors of Douglass, Jackson & Pickett.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

STATE OF SOUTH CAROLINA v. MOSES.

1. It would seem that an action on the official bond of a clerk of court, may be brought in the name of the State alone, but an objection on this ground can be raised by demurrer only.

---

April Term, 1882.

---

2. An action may be maintained against a married woman as surety on a bond without any allegation that she has a separate estate, and without apt and proper words to charge such estate.
3. A clerk of court neglecting to deposit his official moneys in bank as required by law, or to pay out in proper cases under orders of the court, is guilty of a continuing default, for which (without demand by the parties in interest) he and the sureties on his second and additional official bond are liable, although the moneys were received before the execution of such bond.
4. And a verdict for the penalty of the bond is in proper form, and is not vitiated by additional findings for the parties injured by the default, which may be rejected as surplusage. The proper practice in such cases indicated.

---

Before KERSHAW, J., Newberry, November, 1880.

This was an action commenced October 2, 1879. The opinion states the case.

*Mr. James Y. Culbreath*, for appellants.

Moses committed no default in failing to account to one who had forcibly ejected him from his office. 14 *Barb.* 397. Nor in failing to account to the parties in interest, for there had been no order to pay out. 5 *Rich. Eq.* 38. And in no event could there be action before demand made. 2 *Bail.* 51; 1 *Hill Ch.* 423. For a failure to deposit, only the first sureties are liable. 5 *Rich. Eq.* 240. And there was no order to deposit and no damages shown. The verdict is irregular and inconsistent with the complaint. The action was improperly brought in the name of the State. 11 *Rich.* 111. There can be no interest until demand. 2 *Bail.* 51.

*Messrs. Jones & Jones, G. S. Mower*, contra.

The second sureties are liable. *Brandt Sur. & Guar.*, § 453; 2 *Bail.* 397, 480, 524; *McM. Eq.* 370; 2 *Hill* 312; 2 *McC. Ch.* 55; 59 *Ill.* 148; 4 *Strob. Eq.* 149; 5 *Leigh* 414. Objection to party plaintiff could be taken only by demurrer. *Code*, § 167; 12 *S. C.* 130. But State could sue under section 137 of the code. 6 *S. C.* 119; 21 *Barb.* 214; 9 *N. Y.* 176; *Pom.*



## Opinion of the Court.

*Rem.*, § 176; 11 *Okio* 515; 19 *Mo.* 369; 21 *Id.* 112; 33 *Iowa* 345. Mrs. Moses is liable. 15 *S. C.* 581, 602; 8 *Kans.* 525.

January 9th, 1883. The opinion of the court was delivered by

MR. JUSTICE McIVER. This was an action on the official bond of H. C. Moses, as clerk of the Court of Common Pleas for Newberry county. It seems that Moses was appointed clerk by the judge of the Seventh Circuit, within which the county of Newberry is embraced, on February 16th, 1875, and that he then entered into bond for the faithful performance of the duties of the office. He was subsequently required to give a new bond, and accordingly, on April 4th, 1877, he entered into another bond, with all the other defendants, except Montgomery Moses, as his sureties, and the action is brought on the last-mentioned bond.

The breaches assigned are: 1. That he received large sums of money in certain cases stated in the complaint, "which he has neither deposited to the credit of the court in the National Bank of Newberry, nor in any other bank in the Seventh Judicial Circuit, as required by law to do, nor has he turned the same over to Ebenezer P. Chalmers, who was duly elected clerk of the Court of Common Pleas for Newberry county, on July 26th, 1877, and commissioned on August 14th, 1877, nor has he paid the same over to the parties entitled thereto, although often requested so to do." 2. That the said H. C. Moses "has neglected and refused, and still doth neglect and refuse, to turn over to the said Ebenezer P. Chalmers, clerk as aforesaid, as required by law, certain of the furniture and papers of the said office, to wit: the iron strong box, or safe, and the money bonds given in cases in said court." 3. That the said H. C. Moses "did not at each stated session of the Court of Common Pleas for Newberry, present, as required by law, an account to said court of all moneys remaining therein, or subject to the order thereof, stating particularly on account of what cause or causes said moneys are deposited, nor did he file the vouchers thereof in court." Judgment was demanded for the penalty of the bond, ten thousand dollars, and for costs and disbursements.

The defendants, by their answer, submit that the action was

---

April Term, 1882.

---

improperly brought in the name of the State alone, but that it should have been brought upon the relation of some party in interest, who might be held liable for costs, and upon the written authority of the attorney-general. 2. They admit the execution of the bond sued upon. 3. The defendant, Catherine Moses, denies her liability, because she was and is a married woman, the wife of Montgomery Moses, who should have been joined with her as a defendant in the action, and also because there is no allegation in the complaint that Mrs. Moses had any separate estate, or any apt words to fix liability thereon in this action. 4. They deny that said H. C. Moses committed any default in the discharge of the duties of his office as clerk, from the execution of the bond sued until August 18th, 1877, "when he was ejected by an overpowering force, and in violation of law, from his said office, whereby all liability under said bond ceased."

When the pleadings were read, the written authority for the institution of this suit in the name of the State, signed by the attorney-general, was exhibited to the court, whereupon an order was passed by which it was adjudged: "That this suit is properly brought in the name of the State, and that Montgomery Moses should be made a party defendant with his wife, Catherine Moses," and leave was granted to amend the complaint accordingly. This being done, Montgomery Moses filed his answer, admitting that he was the husband of the defendant, Catherine, denying all liability on the bond, and adopting the answer filed by the other defendants.

The cause being thus at issue came on to be heard before his Honor, Judge Kershaw, and a jury, when testimony on the part of the plaintiff, to the following effect, was adduced: 1. That it appeared from the account book kept by H. C. Moses, as clerk, that the several sums of money mentioned in the complaint had been received by him in the cases there mentioned. 2. That E. P. Chalmers was elected clerk on July 26th, 1877, and commissioned as such on August 14th, 1877; that he had qualified, and, on August 18th, 1877, took possession of the office of clerk, and had since that time been acting as such; that on August 18th, 1877, he demanded the office from H. C. Moses,

---

Opinion of the Court.

---

who refused to comply with said demand, and that the said several sums of money above referred to had not been turned over to Chalmers. 3. That demand was made upon H. C. Moses for the money collected in the case of *Harrington and others v. O'Neill and others*, by the attorney of persons interested in said money; that such demand was not complied with, and another suit was then pending for said money. 4. That H. C. Moses had no money on deposit in the National Bank of Newberry, to his credit as clerk, except the sum of \$26.11, and that he had no other account, as clerk, with any other bank in the Seventh Circuit. 5. That the money bonds in the clerk's office remained in the iron safe therein, the key of which was kept by H. C. Moses, who permitted said Chalmers to have the use of it whenever he desired it, and that eventually it was delivered to Chalmers some time before the trial.

The testimony adduced upon the part of the defendant was to the effect: 1. That suit had been brought on the first bond of Moses as clerk. 2. That the several sums of money mentioned in the complaint were all received by H. C. Moses prior to the execution of the bond sued on in this case. 3. That E. P. Chalmers, on August 18th, 1877, forcibly ejected H. C. Moses from the office of clerk, and that an action brought by Moses against Chalmers, to regain possession of the office, was then pending. 4. That no order of court, to deposit money in any of said cases, was ever served upon said H. C. Moses, though notices of application for such orders, in several of the cases mentioned in the complaint, had been served, which were resisted by H. C. Moses, and were not considered by the Circuit judge to whom such applications were addressed.

In the progress of the testimony the Circuit judge announced that there could be no recovery on the bond, "except for the first breach assigned, to wit, the failure of H. C. Moses to account for money received by him as clerk of the Court of Common Pleas for Newberry county," though he permitted testimony to be offered as to the other alleged breaches, and as there was no exception to this ruling by either party, the case must be considered as resting alone upon that breach. At the close of the testimony, a motion for a non-suit was made because

---

April Term, 1882.

---

the money, alleged to have been received by H. C. Moses, as clerk, and not accounted for, was all received before the execution of the bond sued upon in this action, and there was nothing to submit to the jury. The motion was refused, and the jury rendered a verdict in the following form: "We find for plaintiffs forfeiture or penalty of bond, amount \$10,000. Jacob Sligh, Foreman. *Bradley v. Rodelsperger*, \$304.15; *A. B. Boozer, Ex'r, v. Mary J. Boozer*, \$188.48; *Sally Ann Thompson v. Thomas A. Thompson*, \$756.30; *W. H. Harrington et al. v. H. O'Neill*, \$1,280.22; *Sarah F. Richardson v. Thomas H. Chappel*, \$41.93; *Catharine Boazman v. W. W. Boazman*, \$118.34; *Harriet Epting v. Thomas L. Epting*, \$14.15; *James A. Crotwell v. Jane Boozer*, \$14.80; *Isabella Birge, Adm'x, v. W. S. Birge*, \$217.45; *F. W. A. Summers v. W. W. McMorris*, \$135.89. We find for above plaintiffs amounts as specified, with interest from September 17th, 1877. Jacob Sligh, Foreman."

The grounds of appeal raise the following questions: 1. Was the action properly brought in the name of the State alone? 2. Could the action be maintained against Mrs. Moses, a married woman, without any allegation that she had a separate estate, and without apt and proper words to charge such estate? 3. Does the fact that the money, which it is alleged H. C. Moses has failed to account for, was received by him prior to the execution of the second bond, relieve the sureties on that bond from liability and throw it entirely upon the sureties on the first bond? 4. Was a demand necessary to the maintenance of this action? 5. Is the verdict so uncertain or so inconsistent with the complaint as not to warrant the entry of any judgment?

In reference to the first question it is only necessary to say that it could only be raised by a demurrer, and there was no demurrer in this case. *Pom. Rem.*, § 207, p. 247. But even had it been properly raised, it would seem from the authorities that the action was properly brought in the name of the State. *Ibid.*, § 176, p. 214.

The second question is fully disposed of by the recent decisions of this court, in the cases of *Pelzer, Rodgers & Co. v. Campbell & Co.*, and *Clinkscales v. Hall*, 15 S. C. 581, 602.

We come now to the consideration of the third question raised

## Opinion of the Court.

by the grounds of appeal. In *Gen. Stat.* (1872) 166, §§ 46, 47, the following provisions are found: "Sec. 46. All moneys which shall hereafter be paid into the Circuit or Probate Courts of the State, or received by the officers thereof in causes pending therein, shall be immediately deposited in some incorporated State bank or National bank, within the Circuit, of good credit and standing, or if there be no such bank within the Circuit, then in such bank nearest to the place of holding the court, in the name and to the credit of the court. Sec. 47. No money deposited as aforesaid shall be drawn from said bank, except by order of the judge of said courts respectively, in term-time or in vacation, to be signed by such judge, and to be entered and certified of record by the clerk; and every such order shall state the cause in, or on account of, which it is drawn; provided, that money paid into court to be immediately paid out, need not be so deposited, but shall be paid upon order of the court."

When, therefore, money is received by the clerk of the Circuit Court, in causes pending therein, it is his official duty to deposit the same in some bank of good standing, to the credit of the court, of which he is the clerk, unless the money is to be immediately paid out, when it need not be deposited, but may be paid out upon the order of the court. If a clerk neglects or refuses to perform this duty, he commits a breach of his official bond, and becomes liable to an action for the penalty. The default consists, not in receiving the money, but in neglecting or refusing to deposit it in bank; or where it is to be immediately paid out, in not paying out according to the order of the court. This is a continuing duty, and the default continues as long as the performance of such duty is neglected.

The fact, therefore, that the money in this case was all received by Moses, as clerk, before the execution of the second bond, cannot relieve the sureties on the second bond from liability, if the default continued after the execution of that bond. It seems that Moses did continue to make default in this respect after the execution of the bond sued on in this case, and, therefore, the sureties on this bond, as well as those on the first bond, would be liable for any damages resulting from such default. *Treasurers v. Taylor*, 2 *Bail.* 524.

---

April Term, 1882.

---

Under this view of the case, it becomes unnecessary to consider the question whether there was any necessity for a demand, and if so, whether there was any evidence, in this case, of a demand before this action was commenced. It was abundantly proved, and in fact does not seem to have been denied, that the defendant Moses had failed to deposit in bank the money received by him as clerk, with the exception of a very inconsiderable sum, and this was such a breach of the condition of his bond as would warrant judgment for the penalty. If the money had been deposited in bank to the credit of the court, as required by law, then it only could have been drawn out by order of the judge of the Circuit Court, and all that would have been necessary to enable the parties entitled to get their money would have been to obtain such an order, and there would have been no occasion for any demand upon the clerk.

Our next inquiry is as to the form of the verdict, whether it was so uncertain as not to warrant the entry of any judgment. The verdict for the penalty of the bond was, as we have seen, fully warranted by the testimony, and there would be no difficulty in entering judgment on such a verdict. All the rest of the verdict, or rather what is written below the regular and formal verdict for the penalty, may and should be rejected as surplusage, it being a futile attempt on the part of the jury to find damages in favor of persons not parties to the record, which of course must be regarded as a mere nullity. The proper practice in cases of this kind is to enter judgment for the penalty in favor of the obligee, which will stand as a security for those who may have sustained damages by reason of the breach of the condition of the bond, leaving it for those parties claiming to have sustained such damages to come in by proper proceedings and establish their claims; and with a view to avoid multiplicity of suits and secure equality amongst the several claimants, an order should be published requiring all such claimants to come in within a prescribed time, and establish such damages as they may have sustained by reason of the breach of the condition of the bond, and obtain execution on the judgment for the damages so established.

The eighth ground of appeal imputes error to the Circuit

---

Opinion of the Court.

---

judge in charging the jury to allow interest, but as we are unable to discover any evidence in the record that the Circuit judge gave any such instruction to the jury, the question is not now properly before us. When the parties come in to establish their damages, the question as to interest may then be considered.

The judgment of this court is, that the judgment of the Circuit Court be modified in accordance with the views herein expressed, with leave to the parties interested to come in and establish their claims, according to the practice herein indicated.

---

## KOON v. MUNRO.

1. The judgment of this court in *Koon v. Munro*, 11 S. C. 140, stated.
  2. The rule there prescribed for ascertaining the amount of confederate money rightfully in the hands of the administrator held him responsible for the collection of *ante bellum* credits from himself and other solvent debtors, not available for the purposes of the administration, and it was error in the Circuit judge to apply to the case any other principle.
  3. The amount of such moneys improperly collected, as reported by the referee, is sustained by the evidence, and therefore affirmed.
- 

Before THOMSON, J., Union, December, 1879.

The opinion states the case.

*Messrs. Rion & McKissick*, for distributees.

*Messrs. J. B. Steedman, R. W. Shand*, contra.

January 27th, 1883. The opinion of the court was delivered by MR. JUSTICE MCGOWAN. Clinton Wilson died in 1860, and W. J. Keenan administered upon his estate. Keenan died in November, 1867, and William Munro administered upon his estate. In 1869 Henry Koon took out letters of administration *de bonis non* upon the estate of Clinton Wilson, and brought this action against the administrator of W. J. Keenan, for an

---

April Term, 1882.

---

account of his administration of the estate of C. Wilson. Most of the assets of the estate of Wilson consisted of *ante bellum* debts due the estate, and among them a large debt of the first administrator, Keenan himself, and the questions in the case arise out of the manner in which he dealt with these assets during confederate times. He collected most of the debts due the estate in confederate money during the war, and among them his own, and on December 31st, 1864, invested \$5,800 in confederate bonds, for which, though now worthless, credit is claimed for him.

The case was referred to John L. Young, Esq., as referee, who reported that there was due by the estate of Keenan \$8,745.55 in confederate money, and that there was due by the estate \$304.61 in United States currency. Both parties excepted, and Judge Northrop held that the investment in confederate bonds was not allowable, and that the balance found by the referee was due in legal currency. The defendant appealed, and this court determined the principle which should govern the accounting, and remanded the case. See 11 S. C. 140.

This court held as follows: "It would follow, if the foregoing deductions are sound, that the test of the right of the administrator to receive in satisfaction of the debts of the estate, a currency in common use, but not having the quality of a legal tender, is the necessity of the administration; one element of this necessity being the existence of debts capable of affecting prejudicially the assets of the estate unless satisfied, and the other would be just ground to apprehend loss of assets by allowing unsecured debts to remain outstanding. \* \* \* It is clear that in either of these cases, as well as when money is needed to defray current or extraordinary expenses of the administration, the administrator would be authorized to receive such currency at the rate at which it passed from hand to hand in the community as money, unless there should be reason to conclude that it could not be advantageously employed at such valuation for the purposes of the administration. \* \* \* It is proper to add that in applying these principles the administrator ought not to be held to strict accountability as an insurer of such reasonably anticipated results, but so long as he brings a fair and honest



---

Opinion of the Court.

---

judgment, resting on reasonable grounds, to guide his conduct in this respect, he should receive protection. This depends on the principle that one clothed with the exercise of discretion is only responsible for its abuse. \* \* \* As the statement of the accounts was not conformed to the principles that should have been applied to them, the intention of the parties, as may be assumed, not having been directed to such considerations, there should be a new inquiry directed, and confined, as regards the present question, to ascertaining how much, if any, of the account funded in bonds, consisted of confederate currency rightfully in the hands of the administrator as assets of the estate, not available for outlay to meet any other proper exigency of the estate, to the end that the administrator should receive credit for such amount upon the principle above stated," &c.

Accordingly, the case went back to the Circuit Court, and was referred to D. A. Townsend, Esq., as special referee to restate the account of W. J. Keenan, as administrator, in conformity with the principle announced in the judgment of this court, as above stated. He took the testimony and reported that on December 31st, 1864, the administrator, Keenan, had rightfully in his hands, as assets of his intestate's estate, \$1,143.80 in confederate money, not needed for the exigencies of the estate, for which the estate of Keenan should have credit on the investment in confederate bonds, or, so to speak, that the investment to that extent should stand as allowed, and that all the remainder of the bonds should be stricken from the account as not allowed. And upon a re-adjustment of the accounts upon this basis he reported due by Keenan, the administrator, on September 27th, 1879, the sum of \$9,946.05.

To this report the defendant excepted, and the case came on again for trial before Judge Thomson, who recommitted the report with instructions "to take an account of the sums of money which were due the intestate in his life-time by Keenan individually, or by Keenan with others, and credited by Keenan, as received from himself in his returns; and also to take an account of the moneys received by Keenan, as administrator, from all other sources, from debtors according to his returns. And from these two sums, and from their amounts, ascertain the

April Term, 1882.

proportions of the money charged by Keenan, as received from himself, on one part, and received by Keenan from all other debtors, on the other part, which entered into the confederate bonds, and are credited by Keenan as of date December 31st, 1864."

From this decree both parties appealed to this court. The defendant upon the following grounds: "Because his Honor, for the purpose of ascertaining what proportion of the currency that went into the confederate bonds, purchased for the estate of Clinton Wilson, 'was derived from assets of the estate other than that paid by the administrator himself in discharge of his individual and joint debts,' should have ordered that an account be taken of the amount credited by Keenan in his returns, as received from himself on debts due the intestate by him at the date of his last payment of them, viz., on February 22d, 1863; and that from said amount should be deducted the sum then due to the administrator by the estate, as shown by his returns. And also an account of the moneys received by Keenan, as administrator, from all other sources after the date of his said last payment, according to his returns. And that from these two sums and from their amount, it be ascertained what proportion of the sum that went into said bonds was received from himself, and what proportion was received from other sources."

The plaintiff appealed upon these grounds:

1. "For that his Honor has laid down a different rule for ascertaining the liability of W. J. Keenan, as administrator, from that prescribed by the Supreme Court.

2. "For that his Honor did not confirm the finding of the referee upon the matter of fact submitted to him by the decree of the Supreme Court, to wit: 'That on December 31st, 1864, Keenan, as administrator of C. Wilson's estate, had rightfully in his hands, as assets of said estate, \$1,143.80 in confederate currency, not available for the exigencies of said estate, and only this amount.'

3. "For that his Honor did not confirm the finding of the referee, 'that upon a re-adjustment of the administrator's accounts, after applying said credit, he is indebted to the estate of C. Wilson in the sum of \$9,946.05, September 27th, 1879.'"

---

Opinion of the Court.

---

The former judgment of this court declared the principles which should govern the accounting. Until reversed, it is the law of the case. The principle upon which the account should be stated having been determined, the case was remanded simply to apply the principle to the facts which might be made to appear. The only questions which the Circuit Court could consider were, first, what was decided by the Supreme Court; and, second, after applying the facts, how did the account stand.

As to the first question, there does not seem to be any obscurity. The doctrine announced by the former judgment was, that as it is the duty of an administrator to collect the choses of his intestate, and considering the peculiar circumstances of the country at the time—that during the war there was no other circulating medium but confederate money—an administrator would be justified in receiving confederate money in payment of debts due the estate, unless there was reason to believe that such currency could not be used for the purposes of administration or the payment of distributees. As we understand the judgment, the administrator was not to be held liable for taking confederate money for debts contracted before the war, except under the circumstances set forth in the extract of the opinion given above.

It happened that in this case, among the debts received in confederate money, was a large one due the intestate by the administrator himself, and in discussing the principle announced some observations were thrown out, in the opinion of the court, as to the impropriety of the administrator discharging his own debt with confederate money, beyond the probable necessities of the administration, as in that case he would not be acting in the interest of the estate, but in his own. But the judgment does not proceed upon the view that the amount received by the administrator from himself should be the measure of the money wrongfully in his hands. The test was, not what he received from himself, but what he received from solvent debtors, including himself, over and above what might be reasonably considered as available for the exigencies of the estate. If the administrator had reasonable ground to suppose that the whole amount of the debt due by him could have been made available,

---

April Term, 1882.

---

then he might rightly receive from himself confederate money, and discharge his own debt.

According to this interpretation of the former judgment, it is manifest that the Circuit judge did not follow the principle laid down, but propounded a new rule of accountability, making the amount received by the administrator on his own debt, and not that received in excess of the amount available for the purposes of the estate, the measure of the amount which was wrongfully in his hands. As we understand the Circuit decree, it raised what was merely a subordinate point into the main question in the case, and as to the means of carrying out this view prescribed an arithmetical rule of proportion. We think this was error, and this disposes of the defendant's exception, which is based upon the new principle propounded by the Circuit judge.

The only other question is whether the account stated by the referee was in accordance with the principle announced in the former judgment. It seems that he gave the administrator credit for all payments, and as to the confederate bonds allowed \$1,143.80, upon the ground that to this extent the money which purchased them was rightfully in his possession, and struck the remainder of the bonds from the account. The report is not very full as to the precise manner in which he reached that conclusion, but he seems to have proceeded in accordance with the former judgment.

We have seen that the administrator was allowed to receive confederate money in the collection of bad debts, and from solvent *ante bellum* debtors, including himself, to the extent that he might honestly suppose could be made available for the purposes of administration. Now the investment itself in confederate bonds, without explanation, was substantially an admission that at least that much confederate money had been collected in excess of what was needed, for we are authorized to assume that if it had been needed for the purposes indicated, the administrator would not have invested it in confederate bonds. Did he have reasonable grounds to suppose that such a large sum would be needed for the purposes indicated? The distributees lived out of the State and we hear of no instructions upon their part to collect the money or that they would receive the confederate

---

Opinion of the Court.

---

money. The administrator must have known the debts of the estate, indeed he seems to have controlled one of the largest, and it does not appear that the necessities of the administration thus known to him, made it probable that the whole of his large debt would be needed.

When he made his second return, March 11th, 1863, covering the transactions of 1862, and up to that date of 1863, it appears that he was in advance for the estate only the sum of \$906.97, and does not state that at that time he had received any part of his own large debt. The next return was not made until January 10th, 1866, after the war was over, and confederate money had become worthless. In the latter return (1866) he went back into the time prior to his second return (March, 1863,) and charged himself with having received on February 22d, 1863, his own individual debt and that as partner, amounting to \$9,335.69, and this, with other debts received, aggregated a sum so large that after deducting all debts and expenses paid, he still had a large balance on hand, of which, by the same return, he claimed to discharge himself of \$5,800.00, as invested in confederate bonds on December 31st, 1864, when they were very nearly worthless.

If the alleged receipt of his own large debt had not been fixed at a date prior to the time when he expended the money in hand from other sources, the matter would have been perfectly plain. There was probably no actual payment to himself of his own debt, which would have been the merest form, but he simply charged himself as having received it on a particular day. When he made his return (1866) nearly three years after, he fixed that date back in February, 1863, which was manifestly theoretical merely. To say nothing as to the seeming conflict in the returns—that of 1866 claiming that the administrator had received the whole of his large debt on February 22d, 1863, while his second return, made after that time (March, 1863,) made no reference to such transaction, it is enough to state that the reasonable probability of his needing such a large sum for the purposes indicated does not appear. If it were necessary to use a part of his debt to re-imburse himself for money paid out for the estate, that necessity ceased as soon as the amount required

---

April Term, 1882.

---

was received. By the former judgment it was determined that he could not go beyond that, or, at most, beyond what he might reasonably suppose would meet the exigencies of the estate, but he did go beyond to the extent of the money invested in the confederate bonds.

It seems to be conceded that the administrator collected doubtful debts (which are exceptional) to the amount of \$1,328.61, and paid out to Macbeth and Otts \$184.00, leaving a balance rightfully in his hands at the close of the year 1863, of \$1,143.80, for which the report gives him credit.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the report of D. A. Townsend, referee, be made the judgment of the court.

---

EASON v. MILLER & KELLY.

1. In action for recovery of *blank* patterns at a foundry, a verdict for plaintiff "for patterns the value of one hundred dollars" (which could not have included all the patterns at the foundry), does not identify the property, and is therefore void, and may be vacated on motion noticed at the third term, more than a year, after the trial. *Robbins v. Slatterly, MS. Dec. No. 712*, approved.
2. The motion, not being upon exceptions involving errors of law occurring at the trial, or for insufficient evidence, or for excessive damages, was not governed by sections 288 and 289 of the code of procedure.

---

Before KERSHAW, J., Charleston, June, 1881.

The opinion states the case. The Circuit decree, after a statement of facts and the former opinion of this court, continued as follows:

This decision limiting the recovery of the plaintiff to a portion only of the patterns claimed, makes it clear that the verdict is incapable of enforcement, because it is not possible for the sheriff to ascertain from any judgment and execution which could be entered upon it, the particular patterns which it was

---

Opinion of the Court.

---

the purpose of the execution to require him to restore to the plaintiff's possession. The finding in this action must be specific as to the articles to be recovered, and as to their value. *Code*, § 285.

The plaintiff in this case demands the return of all the patterns on the premises on the day in question. The verdict as interpreted by the Supreme Court, finds for plaintiff only a portion, without indicating what portion. The judgment must conform to the verdict, and the execution to the judgment. It would not be possible under such an execution for the sheriff to distinguish what patterns he is required to return. This verdict construed as applicable only to a portion of the articles claimed, is a nullity, incapable of being the subject of a judgment. In that case it is the duty of the court to award a *venire facias de novo*. 5 *Com. Dig.* 521, 523; *Heyward v. Bennett*, 1 *Treadw.* 329; 3 *Brev.* 113; *Mooney v. Welsh*, 1 *Mill. Con. R.* 133.

It is ordered that the verdict in this case be set aside and vacated, and that a new trial be had herein.

*Messrs. Bryan & Bryan*, for appellants.

*Messrs. Lord & Inglesby*, contra.

January 27th, 1883. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The plaintiff brought this action for the recovery of personal property, and claimed that he was the owner of — patterns of the value of \$5,000, which goods were stored on May 11th, 1879, on the premises known as Eason's foundry, Columbus street, Charleston, S. C. The defendants had purchased the property known as Eason's foundry, on April 24th, 1879, at a foreclosure sale, and entered into possession of the same on May 11th thereafter, and claimed that the patterns on the premises were embraced in the mortgage under which they had purchased.

It appeared from the testimony that patterns of the value of \$5,000 were on the premises when the defendants purchased the foundry; that a portion had been placed there at the time of the execution of the mortgage, and the remainder afterwards, but

---

April Term, 1882.

---

the evidence was conflicting as to what proportion was put there before the mortgage and what afterwards. One of the witnesses thought the greater proportion, both in number and value, was there at the time of the execution of the mortgage, and another thought the reverse. Under this testimony the judge, construing the mortgage, charged that it covered such patterns as were on the place at its execution, and that as to these the defendants had a good title. He further charged, that the plaintiff was the owner of such as had been put upon the premises after the execution of the mortgage, and as to these he was entitled to recover. And he left it to the jury, as a question of fact, to determine what proportion had been put upon the premises after the mortgage, with instructions to find their verdict accordingly.

The jury found the following verdict: "We find for plaintiff, patterns the value of \$100." Upon this verdict the clerk, having received no instructions from the court as to the form of the judgment, entered judgment for the recovery "of the personal property described in the complaint, to wit, the patterns which were on the premises on the north side of Columbus street, in the city of Charleston, and known as Eason's foundry, on May 11th, 1879, or \$100 in case a delivery of the said property cannot be had, and also that he recover \$40.45 for his costs."

This judgment was afterwards vacated because it was not in conformity with the verdict, this court holding upon appeal that the verdict could not be legally construed to mean that the plaintiff was entitled to recover all of the patterns on the place on May 11th, 1879, valued by the witnesses at \$5,000, and which the judgment authorized him to recover. 15 S. C. 194.

The judgment having thus been vacated, the plaintiff, at the June term, 1881, of the court for Charleston county, which was the third term after the trial, moved to set aside the verdict on the ground that it was void for uncertainty. Upon the hearing of this motion, Judge Kershaw passed the following order: "It is ordered that the verdict in this case be set aside and vacated, and that a new trial be had herein."

From this order the defendants have appealed, founding their appeal upon several grounds, all of which, however, are embraced



---

Opinion of the Court.

---

in the following: 1. "That no exception having been taken by the plaintiff to the charge of Judge Pressley, presiding at the trial, or to the form of the verdict at the term of the trial and within the time prescribed by law, his Honor Judge Kershaw, was without authority of law to set aside the verdict and order a new trial upon a motion made after the lapse of three terms, and especially this could not be done for uncertainty in the verdict, to which uncertainty the plaintiff had contributed and had not objected. 2. Because the verdict is not void or insufficient, either under the general law, or under the law laid down by Judge Pressley at the trial, under which a valid judgment can and should be entered for plaintiff for one hundred dollars and costs."

It is true, the code provides that in certain cases motions for new trials must be entered on the minutes by the judge who heard the case, which motion, if heard on the minutes, can only be heard at the same term at which the trial is had. *Code*, § 288. Or if the motion is made on exceptions, the judge trying the cause may at the trial direct them to be heard in the first instance at the next or special term, and the judgment in the meantime suspended, and in that case they must be there heard in the first instance and judgment there given. *Code*, § 289.

These sections of the code are applicable when the motion is to set aside the verdict and grant a new trial on exceptions, or for insufficient evidence or for excessive damages. *Code*, § 288. The term "exceptions" as here used has a technical meaning, and it implies that some error of law has been committed by the judge in the progress of the trial, either in some ruling during the trial, or in the charge to the jury. The other two grounds involve errors of fact, to wit, as matter of fact that the verdict is not supported by the evidence, or that the damages are excessive and beyond the testimony. And under these provisions of the code, it is true that when a party desires to move for a new trial upon the ground of an error of law in the judge, or upon either of the above grounds involving the facts, he must make the motion upon the minutes at the term of the trial, or if upon exceptions as to the law, at least at the next term by permission of the judge who heard the case.

---

April Term, 1882.

---

Now the question here is, has this motion been made either upon exceptions involving errors of law occurring at the trial, or for insufficient evidence, or for excessive damages? If so, the argument of the appellants is conclusive, as it is apparent that the motion has not been made either upon the minutes at the term of the trial, or upon exceptions at the next succeeding term under an order of the trial judge made for that purpose. It is admitted that the motion below was made at the third term after the trial term and without any previous notice of such motion given at the trial term, either upon the minutes or otherwise.

We do not look upon the motion below as being made upon either of the grounds mentioned in section 288 of the code. The plaintiff did not complain of the charge of the judge, or of any ruling made by him during the progress of the trial. Nor does he complain that the verdict involves an error of fact. He complains that it is not such a verdict as can be enforced, that it is a void verdict as without meaning, that it is a nullity, in substance that there has been a mistrial; and his motion was not that a verdict which, if left standing, would be valid and could be enforced, shall be set aside and a new trial had, but that that which appears to be a verdict shall be declared no verdict, because without meaning, and be wiped out, expunged from the record, so that the case can be replaced upon the calendar for trial, there having been in fact no trial which has resulted in a real verdict. If this be the conclusion to be placed upon the verdict, then the sections of the code above referred to, could not apply, and they would interpose no obstacle in the way of the plaintiffs' motion.

The next question is: Is the verdict one of the character above described? Is it so vague and uncertain as on that account to be void? This court, on the previous appeal in this case, when the question was whether the judgment which had been entered, was in conformity with the verdict, did not undertake to interpret the exact meaning of the verdict. It only determined that the jury could not have intended to give to the plaintiff all of the patterns on the premises at Eason's Foundry on May 11th, 1879, and the judgment having been entered for

---

Syllabus.

---

all, the court held it did not conform to the verdict and was therefore erroneous. But the difficulty in the case is as to the identity of the patterns found for the plaintiffs, and whether, in the absence of identification by the verdict, any judgment can be entered.

In the case of *Robbins v. Slatterly*, MS. Dec., No. 712, filed April 15th, 1879, which was an action of this kind, this court held that in such actions the verdict and judgment must be in the alternative: that is to say, for the possession of the property, or for its value in case such possession can not be had, and that if the property can not be had for want of identity, a verdict for the alternative in value can not be sustained. Now in the case before the court the verdict has found no designated property in the plaintiff. There is a total want of identification as to the particular patterns found. There is nothing in the verdict by which it could be ascertained what patterns belonged to the plaintiffs, and consequently nothing by which the judgment for the recovery of possession could be entered. Such being the case, the verdict is in fact nothing more than a verdict for the value, which is in conflict with *Robbins v. Slatterly*, *supra*, and therefore a void verdict.

It is the judgment of this court, that the order below be affirmed.

---

GRAVES v. SPOON.

1. A decree different in its result from what the Circuit judge intended it to be, reversed. *Cothran, A. A. J., dissenting.*
2. The claims of creditors of an estate are superior to the claims of distributees, and payments to the latter to the prejudice of the former are justifiable only where the administrator, after a close observance of his prescribed duty, makes such payments in ignorance of outstanding demands, and with assets then of sufficient value to pay all debts. Rules for proper administration stated.

---

Before ALDRICH, J., Laurens, September, 1881.

At the hearing of this appeal, the seats of the Chief Justice and Mr. Justice McGowan, who had been of counsel in the court

---

April Term, 1882.

---

below, were occupied by two of the Circuit judges, Hons. J. H. Hudson and J. S. Cothran.

This action was commenced in 1866 or 1867, in the Court of Equity for Laurens, for an account by the principal defendants of their administration of the estate of their intestate, Joseph F. Graves, who died intestate in 1859. The original pleadings having been lost and no copies preserved, substituted pleadings were served and filed in October, 1880.

The appeal was from the following decree :

This is an old case, commenced in the Court of Equity. The papers were lost, and the action was renewed by complaint and answer. The case was referred to the master, Mr. Barksdale, who made an elaborate report, which was heard on exceptions by his Honor Judge Hudson. The report was very carefully reviewed by the presiding judge, who laid down explicit rules by which the master was to be governed in making up his amended report. This decision was not appealed from, and it is therefore the law of the case. The report of the master, as amended by the directions of Judge Hudson, is now before me on exceptions.

I have considered the opinion of Judge Hudson, and, in my view, the master has carefully followed his instructions. It is supposed by the plaintiff's exceptions that the master has erred in allowing the charge made by the administrator for board, clothing and tuition. I do not think the decree intends to exclude these charges. The children were minors, with a good estate, and were certainly entitled to a support and such educational advantages as became their station in life. When the judge speaks of a separate account with each of the distributees, he does not mean they are not to be supported while the estate is under course of administration. The family is entitled to a support, whether the estate is solvent or insolvent. If it be solvent, the amount paid out for each distributee will be charged to his distributive share in the final settlement; but should it prove insolvent, as did this estate, then the maintenance of the family and the education of the children became a charge on the estate while the same was in due course of administration. Any

---

Circuit Decree.

---

other rule would throw the family on the cold charity of the world immediately upon the death of the intestate.

I do not mean to say the administrator can keep the estate in hand to support the family, but while he is calling in the debts and collecting the assets, any moneys expended for the support of the family are a legitimate charge on the estate. I do not think it was the intention of Judge Hudson to mulct the administrator when he directed the master that the proper rule was to open a separate account with each distributee and charge upon his share the amounts advanced for his benefit. In this case there can be no such account, for the estate is insolvent, and there is nothing to distribute. Hence, the master was compelled to charge these amounts in the general account, and make the administrator bear them. This was not the intention of the judge who heard the cause.

Nor do I think the administrator intended the maintenance and education of the children as a gratuity. He was under no obligation to confer this benefit, and at the death of the intestate it was supposed the estate was ample to pay the debts and leave a surplus for distribution. This estate shared in the losses common to all as one of the consequences of the war. Creditors and distributees must alike submit to the disappointment of these expectations.

It is ordered, adjudged and decreed, that all the exceptions be overruled, the report of the master confirmed and made the judgment of the court. It is further ordered, that the administrator do pay over to the master the amount proved to be due in his report, and interest thereon from the date when the balance was struck. It is further ordered, that the administrator turn over to the master the assets in his hands, as set forth and described in the schedule annexed to the report, and that the costs be paid out of the estate.

Defendants appealed upon the following exceptions:

1. That his Honor erred in confirming the report of the master filed on August 31st, 1881.

2. That his Honor erred in not decreeing that the \$4,785.68 found by the master as due from the administrators should be credited with the amount paid out by the administrators for

---

April Term, 1882.

---

the board, clothing and tuition for the heirs-at-law, who were minors, in the course of administering the estate of their intestate.

*Messrs. Ball & Watts, Ferguson & Young, for appellants.*

*Messrs. James Farrow, W. L. Wait, contra.*

April 27th, 1883. The opinion of the court was delivered by

MR. JUSTICE HUDSON. This is an action by Jacob S. Graves, one of the heirs-at-law of Joseph F. Graves, against John H. Spoon, as administrator of Joseph F. Graves' estate; Ann M. Boyd, as administratrix of the estate of W. W. Graves, deceased, who was joint administrator with John H. Spoon, and the representatives of the sureties on their administration bond, and the other heirs-at-law of Joseph F. Graves. The object of the action is to compel the said administrators and their sureties to account, and to effect a settlement and distribution of the said estate. The appeal is brought up by the said surviving administrator, John H. Spoon, and the legal representatives of the deceased co-administrator and sureties.

After great delay the cause was heard on Circuit at the February term, 1881, of the Circuit Court for Laurens, and on the 28th day of that month a decree was filed, wherein is set forth certain principles upon which the master was directed to state the accounts of the said administrators. In accordance with what he conceived to be the rules therein laid down, the master, after references held, and much testimony taken, stated the accounts and filed his report, in which he finds the sum of \$4,785.68½ in the hands of the administrators, and due and owing by them September 21st, 1881. This balance he reports insufficient to pay the outstanding debts of the deceased, Joseph F. Graves. In ascertaining this balance he allowed the administrators no credit for payments made to the heirs by way of partial distribution of the estate, nor for moneys expended by them in maintaining the family of the deceased. He did, however, open separate accounts with the distributees, in which he did allow to the administrators credit for all sums which it was

---

Opinion of the Court.

---

proved they paid to or expended for them in their support and maintenance. But the estate being insolvent, and there being nothing for distribution, the result of this mode of stating the accounts is, that the administrators have really received no credit for these disbursements.

Upon exceptions to this report, the cause was again heard on the Circuit, and the presiding judge, evidently misapprehending the manner in which the master had stated the accounts, and being led, by inadvertence or otherwise, to believe that full credit for these outlays for the family, had been given to the administrators by the master in his report, and holding in his decree that such credits ought to be allowed under the circumstances of the case, confirmed the master's report. In so doing he reached a result just the opposite to what he intended. From this decree of October 12th, 1881, the appeal is brought up in behalf of the administrators, who seek to correct this unintentional error of the Circuit judge, and to have this court to award to the defendants' administrators the credits which the master refused and which the Circuit judge intended to allow, but inadvertently denied to them by confirming the master's report. On the contrary, the plaintiff, and those defendants who are identified with him in interest, seek to uphold the accounts as stated by the master and confirmed by the Circuit judge, contending that the decree is correct in its result, notwithstanding he may have intended a different conclusion.

It is very clear that the decree of the Circuit judge is different in its result from what he intended it should be, and for this reason must be reversed unless there is found enough in the brief to satisfy this court that the master has correctly stated the accounts, and that the decree confirming the same should stand. A careful examination of the brief in connection with the argument of counsel, satisfies us that the real issue in the case was not pressed either before the master or the Circuit judge in such a way as to secure a direct judgment on the point.

Before the master, the chief inquiry seems to have been as to the amounts to be allowed as credits, rather than the mode and manner of stating the accounts so as to secure the allowance of those amounts as credits to the administrators. The estate being

---

April Term, 1882.

---

clearly insolvent, and there being no fund for distribution, the only mode in which credits can be made available to the administrators, is by allowing them in the general account. To open separate accounts with the distributees for the purpose of allowing the credits there, is of no benefit to the administrators; and this is the mode adopted by the master. The master supposed he was following strictly the directions laid down in the decree of February 28th, 1881. But that decree did not contemplate the insolvency of the estate, and prescribed rather the method of adjusting the accounts of a solvent estate where a fund is left for distribution after the payment of debts.

The questions which should have been raised and carefully investigated before the master and the Circuit court are, first, whether the administrators of this insolvent estate are entitled to have credit allowed them at all for any partial distribution of the estate in their hands to the heirs-at-law of Joseph F. Graves, and for any sums expended by them in the support and maintenance of the family of the deceased; and second, if so, to what amount. The last of these inquiries has been made and passed upon, but the first, which is of great delicacy and importance, seems not to have been raised directly, and has not been passed upon except in the reasoning of the Circuit judge, which is at variance with his conclusion.

The doctrine of the decree of October 12th, 1881, is at variance with the authorities, and in its broad, liberal and unqualified terms, cannot be sanctioned by this court. The rights of the creditors of a deceased are superior to the claims of heirs and distributees. The administrator of an insolvent estate, with full knowledge of the insolvency, will never be upheld in bestowing the assets upon distributees, and leaving debts unpaid; nor will he be justified in distributing the assets, nor in expending them in educating and maintaining the family, whilst ignorant of the existence of debts, provided, he ought to have known of such. His first duty is to the creditor. He is bound to take notice of the existence of debts, and is required to exhaust all efforts to discover the creditor, and to comply fully with the requirements of the law regulating and prescribing his duty in this respect.



## Opinion of the Court.

By all proper diligence the executor or administrator must acquaint himself with the real condition of the estate before he begins to administer the assets. His duty is to gather in the assets, and to ascertain the number of creditors and the amount and the rank of their claims, before he undertakes to pay them. The payment of debts out of their legal order, the payment of legacies before creditors, the payment of family expenses for education and maintenance, partial or full distribution to the heirs in the face of outstanding debts, are all acts of *devastavit*, if thereby creditors are prejudiced. In respect to creditors, the administrator is held to the rule of strict accountability, and the exercise of the greatest diligence and the best of faith.

A diversion of assets to any of these purposes will be sustained by the courts, only when the administrator shows that in so doing he acted in good faith, and with a due regard to the rights of creditors. This he may show by establishing the fact that he had fully complied with the requirements of the law and the rules of diligence, and good faith in his efforts to ascertain the existence of debts, and made the payments after such effort and in ignorance of the existence of the creditors thereby prejudiced, or he may relieve himself of personal liability, by showing that when these payments were made he was in receipt of assets amply sufficient to pay all creditors, which assets have, however, by some unforeseen and unavoidable calamity, been diminished in value or rendered worthless. His justification must be established by clear proof of the best of faith, such proof as will entirely negative the charge of mal-administration or *devastavit*.

The rule prescribed by the courts of England on this subject is to be found in 2 *Wms. Ex.*, §§ 1158 *et seq.* and 1531 *et seq.* The stringency of this English rule is somewhat relaxed by the courts of the States of our country, but in no State to such an extent as to relieve an administrator from the observance of a strict line of duty and a strict regard for the superior claims of creditors. *Uberrima fides* must attend all his acts of administration in addition to a full compliance with the letter and spirit of the written law. This rule of the American courts is to be found in 1 *Story's Eq. Jur.*, § 90.

Now, in order to afford the appellants an opportunity to jus-

---

April Term, 1882.

---

tify their expenditures in educating and maintaining the family of the deceased, and in making partial distribution to them or any of them, of the assets of the estate in compliance with the rule of good faith, diligence and observance of law which we have indicated, the case must go back to the Circuit Court for further inquiry. If the appellants establish before the master their right to the credit claimed, or to any credits, the same must be entered in the general account. Being unable to foresee or anticipate the circumstances under which the administrators made the payments for which they claim credit, but which are alleged by the plaintiff to amount to a *devastavit*, we have avoided the citation of decided cases, deeming it proper and best only to lay down in general terms the rule of accountability enforced against executors and administrators, and to leave to the court below to apply the authority of appropriate decisions to the facts as they may be developed.

It is the judgment of this court that the judgment of the Circuit Court be reversed; that the accounts as stated by the master be re-opened, and that the case be remanded to the Circuit Court for inquiry into the right of the appellants to the credits claimed by them in the statement of their accounts, and for inquiry into such other matters and things in connection with said accounts as are not concluded heretofore in the course of this litigation.

MR. JUSTICE COTHRAN, *dissenting*. Being unable to concur in the opinion of the majority of the court, in this case, I propose to state briefly the grounds of my dissent. Fortunately for the administration of justice the reversal of the Circuit judge's decision by a bare majority of the appellate tribunal, is not attended, in this case, with any unsatisfactory consequences, for the reason that there is no difference between my brethren and myself as to the true rule of stating the accounts of an administrator, the main question involved here. It is only as to the application of the rule to the case under consideration, that a difference of opinion exists.

Owing to the inevitable fate of all the living, the principles of accounting have long since become fixed, and the true statement of such in this case is as they are laid down in "the horn books"

---

Dissenting Opinion.

---

of the law. The well-established principle of *stare decisis*, which so commends the system of English jurisprudence to the admiration of mankind, has caused the English judges to adhere to a Procrustean rule upon this subject, from which they have been unwilling to depart, and which is reiterated by Mr. Williams in his great work on Executors, Vol. II., § 1158 *et seq.*

Our own courts, availing themselves doubtless of the opportunity and of the right afforded by the establishment of the independence of the colonies, have wisely relaxed the strictness of the inflexible English rule. Mr. Story, at section 90 of his work on Equity Jurisprudence, after referring to the harsh rule of the English courts, says: "If this be a true description of the actual state of the law upon this subject, it would become an intolerable grievance if courts of equity should not be able under any circumstances to interfere in favor of executors and administrators, in order to prevent gross injustice. \* \* \* But to found a good title to such relief, it seems indispensable that there should have been no negligence or misconduct on the part of such executors or administrators in the payment of the assets; for if there has been any negligence or misconduct, that, perhaps, may induce a court of equity to withhold its assistance."

Tried by the English rule, where neither upon the score of inevitable accident, destruction by fire, loss by robbery, or the like, nor of reasonable confidence disappointed, nor of loss by any of the other means which afford an excuse to ordinary agents, and besides, in cases of loss without any negligence on their part, these fiduciaries would be found without remedy. But conceding to them all the advantages of the more liberal doctrine of our courts, does the case, as made, entitle them to relief? This is the true question.

The office of administrator is purely voluntary upon the part of him who assumes it. It implies willingness to assume and ability to discharge the duties of the trust. Judge Story says there should be "no negligence or misconduct," and this, I apprehend, should be made by the fiduciary to appear affirmatively—that is to say, the burden is upon him to show that he has been both diligent and faithful. These qualities are "indispensable"

---

April Term, 1882.

---

in establishing "a good title to relief," says the learned commentator. Examined in the misty and uncertain light of the principal administrator's own testimony (for he was necessarily almost the only witness), and by the confused state of the records in the ordinary's office, which ought to have been made plain by him, where is the evidence of the "indispensable" qualities of diligence and fidelity in the administration of this estate? and is not the absence of these the most conclusive evidence of "negligence and misconduct"?

The intestate died nearly twenty-five years ago. Administration of his estate was promptly taken out, the personal property was sold, and there, so far as the primary duty of ascertaining and paying of the debts was concerned, the business of the administration seemed to end. Eight or ten years afterwards an effort was made to call them to account. The pursuit of them under great difficulties has been steadily kept up ever since, and through every court that had (rightly) jurisdiction of the subject matter. *Pomeroy*, § 690; recognized in *Lupo v. True*, 16 S. C. 586. The administrators chose their line of defense then, and they should be held to it now.

It was a stubborn denial of everything charged against them by the plaintiff. They denied that there was even such a person as their intestate—that they had received and converted his estate—in short, that they owed the plaintiff anything. Through many doublings they have been finally unearthed and now ask to be allowed to adopt another and totally inconsistent line of defense, and thus the game is to be turned loose for the questionable pleasure of another chase. For twenty-five years they had possession of this estate; for more than fifteen years, by means of a false and deceitful answer, have they avoided accountability to those who are entitled to it, nor have they asked anywhere in the pleadings the privilege of resorting to another line of defense. They stated their defense upon a denial of all liability, and it has served them well, but to that should they be held.

It may be said, however, that this general denial is but the observation of counsel. To this it may well be replied, that parties to a cause speak only through their counsel, and that it was upon this observation, now found to be untrue, that the

---

Syllabus.

---

issue was made up which has been so long upon trial. Ordinary truthfulness, to say nothing of *uberrima fides*, such as induces a court of justice to overlook the shortcomings of fiduciaries should have caused these defendants to come into court when requested so to do in 1866 or 1867, and to have said in substance at least: "We knew the intestate Joseph F. Graves; he had an estate; we sold it and are indebted. We attempted to administer it according to law; his orphan children were hungry and we fed them; they were naked and we clothed them. The assets of the estate were more than sufficient to pay all the debts as was ascertained by us in the manner prescribed by law, but a great revolution has swept over the country, destroying values and wrecking this in common with other estates, and we pray you have us excused."

If they had done this, which I understand to be the requirement of the law as liberalized, I would most cheerfully concur in the main opinion in this case; but in the absence of this, and in the face of the negligence and misconduct of these fiduciaries, I am at a loss to perceive how any distinction can hereafter be made between trustees who act in good faith and those in whose conduct this "indispensable" quality is so conspicuously absent.

---

WITHERSPOON v. WATTS.

1. Circuit decree charging only one of two executors with funds of the estate received by the executor charged, sustained.
2. Executors will not be removed from office, except where guilty of willful misconduct, waste or improper disposition of the assets.
3. A widow having renounced all interest under her husband's will and elected to take dower, the dower is not primarily chargeable upon the property given to the widow by the will, but must be laid off in each of the several tracts of land; or if money be assessed in lieu of dower, the assessment must be paid by the devisees of the land, or out of the proceeds of their sale.
4. Funds of the residuum used by the executors in paying off the assessment for such dower, must be replaced by the devisees of the land or out of the proceeds of sale of their land.
5. A bequest of money afterwards described by the testator as property "specifically disposed of," is a specific legacy.

---

April Term, 1882.

---

6. A finding of fact by the Circuit judge as to a claim of land by adverse possession, sustained.
  7. Where a testator disposed of a tract of land to be held in trust for A., for life, and by the same clause forgave A. a large indebtedness, where A. accepted this release and was a party to two actions in which this tract was claimed to be the property of testator, and the dower claim of the widow therein was provided for out of other property of the testator, A. will be held to an election and cannot afterwards claim this land by adverse possession under a parol gift from testator.
  8. Where a widow renounces her interest in an estate under a will, property left to her for life with remainder over, vests instantly and absolutely in the remaindermen, and property given absolutely to the widow becomes assets in the hands of the executors undisposed of by the will.
  9. Where land is purchased with the proceeds of property specifically devised and is then turned over to a legatee in payment of his specific legacy, the amount so used must be refunded out of the estate if sufficient, or else out of the purchased land.
- 

Before KERSHAW, J., Laurens, November, 1880.

Hon. A. P. Aldrich, of the Second Judicial Circuit, sat at the hearing of this appeal in the stead of the Chief Justice, who had been of counsel in the cause.

Action by J. H. Witherspoon and Phoebe G., his wife, against James W. Watts and William Anderson, as executors of the will of John D. Williams, deceased, John G. Williams, John D. Garlington, W. A. W. Anderson and J. D. Watts, commenced December 27th, 1879.

The case was referred to a referee, who took the testimony, and reported the same, together with a statement of the accounts of the executors, to the Circuit Court. The exceptions to this report sufficiently indicate the items and omissions objected to. They were as follows:

*Plaintiff's exceptions:* 1. Because said referee should have reported that the \$2,192.00 paid out on December 29th, 1879, by executors for land, was from funds really belonging to Mrs. Phoebe Y. Witherspoon and John D. Garlington; that the land should have been transferred to said devisees, or charged for their benefit with the repayment to them of said amount and interest, and that said referee should have put said amount in Schedule B. as a payment made by said executors to said devisees.

---

Statement of the Case.

---

2. In overruling each or any of plaintiff's exceptions which were overruled to introduction of testimony.

3. In allowing each or any of defendant's exceptions, which were allowed, to the introduction of testimony offered by plaintiffs.

4. In allowing each or any of the following contested items of executors' accounts as mentioned in report of referee, to wit, the third item of \$506.61; the fourth item of \$1,323.45, and the seventh item of \$500.00.

5. In allowing commissions to the executors on the amounts received by them for rents of real estate.

6. In not reporting that the accounting herein was not final, but that a large amount of choses in action and personal property of the estate were still on hand, and should be accounted for hereafter, and that the accounting of the executors on the copartnership with the estate as to Homestead Mill place and White Plains place was still open for a further accounting.

*Executors' exceptions:* 1. Because the referee fails to report that there was a balance against J. Y. Watts, as surviving partner of the testator, John D. Williams, in a farming contract on the White Plains place, of \$1,176.74, for the year 1874, together with the items of balance on the same contract, for 1873, of \$1,776.50, all of which counsel for executors claimed should have been excluded from their general account as executors.

2. Because the referee omitted to report the testimony upon which he reported vouchers for payment on the John G. Williams' note, \$172.20, or to give the law by which he was led to his conclusions.

3. Because the referee, in his statement of account, erred in not stating his findings of fact and conclusions of law therein separately.

4. Because the referee erred in charging the items of \$1,776.50 and \$1,176.74, the balance for the years 1873 and 1874 respectively, against J. W. Watts, the surviving partner of the testator, John D. Williams, against the executors, when, it is respectfully submitted, these items, amounting to \$2,953.24, constitute simply an indebtedness against J. W. Watts individually, but that this amount should, under no circumstances, have been charged

---

April Term, 1882.

---

against William Anderson, as executor, either jointly with J. W. Watts or otherwise.

5. Because the referee erred in charging the defendants, the executors, with interest per annual balance, either simple or compound, in his statement of accounts against them.

6. Because the referee erred in not continuing the reference until the creditors of John D. Williams could be called in to establish their claims.

CIRCUIT DECREE.

On June 25th, 1870, John D. Williams, of Laurens county, died, leaving in force his last will and testament, in which James W. Watts and William Anderson, the defendants, were named as executors, and afterwards proved the will and qualified, as will appear by reference to a copy of said will annexed to the complaint in this action, the date whereof is April 25th, 1870.

The first clause of the will directs that the debts be paid as soon as practicable.

The second clause is in these words: "I will and bequeath to my beloved Wife, Anna C. Williams, for her sole and separate use and benefit during her natural life, the house and lot in the Village of Laurens, on which I now reside, containing one hundred and twenty-two and one-half acres; also a small wood-land tract of land, on the right side of the Greenville road, adjoining lands of John M. Franks and containing about forty-eight acres; also all my silver plate, dining-room furniture and household and kitchen furniture; all three of my carriages and a pair of horses, two good mules and my riding Mare Fannie, with such other stock as she may desire to keep on the place, and such other provisions as she and the family may need, and provender for the stock on hand, as may be sufficient for their necessities for the time, and hereby give her the power and privilege of disposing at her death, of any of the plate or furniture above mentioned, to either of my daughters or grandson John D. Garlington as she may see fit, they accounting to my estate for the same as an advancement, the balance of the above Estate hereby given to her, at her death to revert to my estate for distribution as hereinafter described."



---

Circuit Decree.

---

In the third clause testator recites that "having heretofore made large advancements to my son John G. Williams, which with the portion of my Estate which I now give to him in this clause, I consider to be a fair proportion thereof: I give and bequeath to my Executors hereinafter named, for his use and benefit during his natural life, my Spring Grove tract of land, including the land which I have added thereto, all lying on the west side of Mudlick Creek and supposed to contain about fifteen hundred acres, together with all the property which was on the said place when he took charge of the same; to remain in his possession and enjoyment unless efforts be made to subject the same to the payment of his debts and liabilities, and in this event to be taken charge of by my Executors to prevent and protect the same from such liabilities, and at his death to be equally divided between such child or children as he may leave surviving him at his death, or should all his children die before obtaining the age of twenty-one years, then to revert to my Estate for division as the residue of my Estate is hereafter directed, and with the provision that no more of the wood land is to be cleared up for cultivation, hereby directing my Executors hereafter named, immediately after my death to deliver and hand over to my said Son all the notes I hold on him and also all the accounts I have against him previous to 1st January, 1869, amounting to several thousand dollars in lieu of his interest in the balance of my Estate."

By the fourth clause of the will testator gave his daughters, Lucy and Phoebe, and to his grandson, John D. Garlington, his White Plains place (reserving the burial ground) and all the property belonging to said place at his death, to be kept together and managed for their maintenance, support and education, until the said grandson came of age, or if he should die before that time, until either of his said daughters should marry; then if either his grandson or either of his daughters desired it, a division of the property bequeathed in that clause might be made by sale or otherwise, as may be most desirable. And should either of his said daughters or grandson die, leaving no children or child living at his or her death, then the share of such decedent should go to the survivor or survivors.

---

April Term, 1882.

---

In the fifth clause of the will testator gave to his grandson, John D. Garlington, all the books that belonged to his father.

In the sixth clause he gave to Dr. Wm. Anderson (the defendant), in trust for the use and benefit of his son, Washington A. Williams Anderson, fifteen hundred dollars, and in case of his death before attaining the age of twenty-one years, then to his mother, Elizabeth L. Anderson, and her children then surviving.

In the seventh clause of his will he gave to J. Washington Watts (the defendant), in trust for testator's namesake, the youngest son of said Watts, fifteen hundred dollars, but if he should die before reaching the age of twenty-one years, then the same to his said father, if he be then living, and if he be then dead, the same to be divided among the other children of the said J. Washington Watts.

The eighth clause of the will is in these words in part: "It is my desire to keep my Homestead in the Village of Laurens in my family; it is therefore my will and desire, after the death of my kind wife, that either of my daughters or my grandson John D. Garlington, take the same at a fair valuation, and if neither of these desire it, then it, together with all the other part of her said life-estate, be sold and divided among my said daughters and said grandson; the child or children of my said daughters or said grandson to represent their parent if the parent be dead."

By the ninth clause testator directs that the plantation which he purchased from the Simpsons, and his interest in the lot upon which he had erected a mill, be held by the executors for the benefit of his wife and daughters and grandson John D. Garlington, to assist in their maintenance and support, and that the arrangement he had made with his friend and relative, Dr. William Anderson, being similar to the one which he had entered into with his nephew, James W. Watts, in reference to the White Plains place, be continued in force until the first day of January, 1875, and as long after as might be desirable or thought best by his executors; and when thought best to make a change, he gave to his daughters and grandson the same privilege to take the same at a valuation as in the case of the homestead; and should neither of them desire it, then that it be sold and

---

Circuit Decree.

---

divided as in case of the residue of his estate in the eleventh clause of the will.

In the tenth clause, testator directed the Milton mill to be sold and that the proceeds of the sale be applied to the satisfaction of a note held by him on one Thomas Crowder, deceased, and Thomas H. Crowder, after first crediting the same with one thousand dollars. The balance of said proceeds to be paid, three-fourths thereof to the children of Thomas Crowder, and the remainder to Thomas H. Crowder.

The eleventh clause is in these words (as far as necessary to transcribe the same), to wit: "Having specifically disposed as I desire, I will and bequeath all the rest and residue of my estate such part thereof as I have not otherwise directed, to be sold by my executors at their discretion and the proceeds thereof to be divided as follows: One-fourth part to Col. James W. Watts, and Dr. William Anderson, in trust for the sole and separate use of my said wife during her natural life, with the power on her part of disposing of the same at her death to such persons as she may see fit; and the remaining three-fourths to be equally divided between my two daughters and grandson in equal portions." Then follow limitations over in case of the death of either of them, without leaving issue surviving, first to the survivors with limitations over, in case of the death of the last survivor without leaving issue.

In the twelfth clause of the will, testator expresses the desire that his daughters and grandson remain with his wife as long as they should see fit, and while so remaining to contribute out of their several estates their proportion of the necessary expenses of the household, and, should it become necessary to repair or rebuild any of the houses on the home place or to supply the same with stock necessary for the use of the family, the same was directed to be done by the executors out of the estate.

The thirteenth clause referred to the agreement with James W. Watts, with regard to the cultivation and management of White Plains, which testator desired to be continued until its expiration and longer if agreeable to the parties. The fourteenth clause directs how his estate should be disposed, in case of the failure of all the previous limitations. The fifteenth clause

---

April Term, 1882.

---

directs that the shares of his estate which he has given to his daughters, should be held by his executors in trust for their sole and separate use and benefit. The sixteenth clause is practically revoked by the codicil. The last clause names his executors, and desires them to be well compensated for their services, if their legal commissions are not sufficient; desires his friends, J. Wister and William D. Simpson, as his counsel in all matters pertaining to his estate.

Testator also left of force a codicil to said will, dated June 11th, 1870, wherein he refers to the twelfth clause of his will directing his daughters and grandson to contribute out of their estates for the necessary expenditures of the household and the other directions therein in respect of the same, and directs as follows: "Now in order to make some ample provision for the maintenance of the home place and for the support and comfort of my said wife, daughters and grandson, I further will and desire my executors to supply my said home place during the life of my said wife from my estate, with all necessary provisions, to be taken from any of my plantations or my mill, and likewise to furnish all necessary stock for the place; to keep the roads, fences and houses in good order, rebuilding the same if at any time it may become necessary."

He proceeds to make the directions contained in the sixteenth clause of the will and directs that the mill be disposed of as directed in the ninth clause of the will, and that Dr. William Anderson take control of and manage the mill and be allowed whatever is right for his services. Lastly, he directs the disinterment and removal of the remains of the members of the family, from the family grave-yard at White Plains, and their re-interment at Laurens Village Cemetery, and requests his friend Dr. John W. Simpson to take charge of, superintend and direct the same; charging the estate with all the expenses attending it, including proper compensation for himself, and directing the executors to pay the same.

Testator left surviving him a widow, Anna E. Williams; three children, Phoebe, wife of James H. Witherspoon (the plaintiff), Lucy Williams and John G. Williams, and a grandson, John D. Garlington, who were his heirs-at-law. Some time in 1871

---

Circuit Decree.

---

Lucy Williams died unmarried and intestate and John G. Williams, the defendant herein, administered on her estate.

Some time prior to April 25th, 1873, Anna E. Williams, the widow, renounced her interests under the will of her husband, and elected to take dower in the lands of the estate, and instituted proceedings to recover the same in the Probate Court of Laurens county. Under these proceedings the sum of twelve thousand four hundred dollars was assessed as the value of her dower in all the lands of her said husband, whereof he died seized, and a decree of the court in said cause directed the executors to pay her the said sum in lieu and bar of her said dower.

September 26th, 1873, the said executors commenced an action in this court against the said Anna E. Williams, John G. Williams, Phoebe Y. Witherspoon and John D. Garlington, setting forth the facts herein before stated; that the election of the widow to take dower, and the death of the daughter Lucy, had introduced important changes into the estate, giving rise to important questions as to the construction of the will and their duties thereunder, among which were, as to what portion of the estate should be sold to meet the dower assessment? To what extent Spring Grove should be subjected to the payment of dower? And what disposition should be made of the interests under the will renounced by the widow, upon which points they desired the instructions of the court.

In that action a decree was rendered by consent, bearing date October 27th, 1873, directing an appraisement of such portion of the personal property which had been bequeathed to his widow by said testator, as Phoebe Y. Witherspoon and John D. Garlington desired to take at a valuation, and the delivery of the same to them respectively upon their several receipts. That the executors have leave to sell at their discretion the balance of said personal property and also the homestead, the small woodland lot devised with it, and the mill tract near the village of Laurens, "for the purpose of meeting the dower of the said Anna E. Williams, the debts and pecuniary legacies, &c., prayed for in the complaint." It was further ordered "that the questions in the pleadings as to the proper construction of the

---

April Term, 1882.

---

will, as to the rights of the parties growing out of the change in scheme, on account of the election of said Anna E. Williams to take dower, and the renunciation of her interest under said will, be reserved for the further adjudication and determination of this court, and all other equities reserved."

It does not appear that any further order was made in that cause. Under this decree the executors have sold all the lands, &c., therein authorized to be sold, except two tracts, collectively called the Mill tract, containing six hundred and forty acres, which remain unsold. They have paid the money decreed to be paid for the dower. They have had possession of the real estate described in the will, except Spring Grove, which has been in the possession of John G. Williams, and have received the rents and profits arising therefrom, or occupied them as directed by the will; but in regard to White Plains, which was rented by Phoebe Y. Witherspoon under an agreement with the executors, with the personal property thereon, from January 1st, 1876, to December, 25th, 1879, the condition is peculiar. The rent for the year 1876 was fixed at twenty-five bales of cotton, weighing four hundred pounds each; twelve and a half bales to be delivered on or before December 25th, 1876, at Clinton or Chappels depot as the executors might prefer, and the other twelve and a half bales to be receipted for by Mrs. Witherspoon as her interest under the will in the proceeds of the crop of said plantation. The said agreement was to continue after 1876, to December 25th, 1879, at the election of Mrs. Witherspoon. She has continued in possession up to the present time.

There are demands still outstanding against the estate, two in number, one of which is a suit upon a sheriff's bond upon which the testator was surety, and both are in litigation. The amount of these demands is claimed to be large, but as yet unknown.

John D. Garlington became of age October 25th, 1879.

On September 1st, 1875, John G. Williams commenced an action against the executors, setting up a claim to Spring Grove under an alleged parol gift from his father, John D. Williams, and praying that he be decreed entitled to the same, free from the trust and limitations of the will, but said action has never been brought to a hearing.

---

Circuit Decree.

---

The present action alleges many derelictions and claims many liabilities against the executors, and prays that they may be required to account, and to pay the plaintiff, Phœbe, the amount due her; that the property remaining be divided under the will or sold under the direction of the court, and the proceeds distributed; that if, for the payment of debts, it be necessary that legacies and devises abate, that all abate ratably; that the executors be enjoined from further disposing of the property of the estate or receiving money due the same (alleging their insolvency), and that they pay the same into court and turn over to the custody of the court the amounts to be disbursed under the order thereof; that the legatees and devisees account for what they have each received; that all the defendants be enjoined during the pendency of this suit, from receiving or disbursing moneys of the estate, or disposing of the property thereof, or interfering with or bringing action, or taking any proceeding against the plaintiffs, to oust them of the possession of the White Plains plantation, or the personal property received by them under their lease thereof, and for further relief.

The executors, in their answer, take issue with the plaintiffs in regard to all allegations affecting their liability, or allege circumstances in avoidance of the same. John G. Williams sets up his title to Spring Grove, as obtained under a parol gift from the testator, and adverse possession thereunder for more than ten years before his death, and claims the protection of the statute of limitations as to the personalty upon the place and the legacy of his indebtedness to his father. He also claims, as administrator of Lucy Williams, whatever may be found to be due him in that capacity. The answer of John D. Garlington raises no question with the executors and needs not to be further recited.

An order was entered in the cause at February term, 1880, enjoining the executors from selling any portion of the estate and directing the status of the estate to be maintained until the further order of the court, and directing a reference "to take testimony upon all issues in this case" and to report the same, and to state the accounts of the executors and the sums received by each legatee or devisee, with leave to report any special matter, and granting plaintiffs leave to amend by making the infant

---

April Term, 1882.

---

legatees, Washington A. Williams Anderson and John D. Williams Watts, parties defendant. The referee has stated the accounts and reported the testimony on the other branches of the case. There were many exceptions to the report, and a number of exceptions to testimony admitted or rejected. In this condition the cause is before me for determination.

The exceptions to the accounts of the executors will first be considered. The referee has given no reason in his report for his decisions upon the questionable points, and this is made the ground of one of the exceptions. Certainly the law requires a judicial officer to give his reasons for his decisions, and the court can obtain but little aid from a referee upon such points unless this is done, but the report will not in this case be returned on this account.

The first and fourth exceptions, on the part of the executors, object that they were jointly charged with balances found due by J. W. Watts on the copartnership between him and the estate, which was continued, in pursuance of the provisions of the will, for some years after the death of the testator. I can see no propriety in charging Dr. Anderson, the co-executor, with this liability. The rule is, "that the actual possession and use by one of two executors, is not in law the possession and use of both, so as to attach any liability upon both." 1 *Wms. Ex.* "And an executor shall not, under ordinary circumstances, be responsible for the assets come to the hands of his co-executor." *Id.* 1292. These principles are fully recognized in our own cases. *O'Neill v. Herbert*, *Dudley Eq.* 30; *Clarke v. Jenkins*, 3 *Rich. Eq.* 319, &c. There are in this case no special circumstances to vary the rule. The decision of the referee in regard to the balance due by J. W. Watts, on the contract in relation to White Plains, for the year 1873, amounting to \$1,776.50, and that for the year 1874, amounting to \$1,176.74, whereby these balances were charged as a liability against both executors, is reversed, and it is adjudged that the same are chargeable only against J. W. Watts.

The second exception of the executors objects to the rejection by the referee, without reasons assigned, of a due bill paid by the executors to Hugh Leaman. It was given by John D.



## Circuit Decree.

Williams to John G. Williams, dated February 13th, 1861, and is not negotiable upon its face. It was entered in the returns as a payment to John G. Williams on a note. The payment to Leaman, or his authority to receive the money, is not questioned by John G. Williams. It should, therefore, have been allowed, unless the payment to John G. Williams would have been an error.

Testator bequeathed that all John G. Williams' notes and accounts be given up to him, "in lieu of all his interest" in the estate. No reference is made in the will to this note or any indebtedness from testator to John G. Williams, and nothing is said therein, whence it might be supposed to be the intention that this legacy should operate as a satisfaction of any demand of this nature held against the testator by John G. Williams. When the testator takes no notice of the debt or leaves the intention doubtful, the legacy will not be held to extinguish the debt. 2 *Story Eq.* 1123. Slight circumstances will be laid hold of to avoid the construction, that a legacy is to operate as satisfaction of a debt. *Hinchcliffe v. Hinchcliffe*, 3 *Ves.* 529. It is said to be "an absurd rule" that a legacy shall be intended as satisfaction of a debt. *Barclay v. Wainwright*, 3 *Ves.* 466. A negotiable note will not be held satisfied by a legacy. *Carr v. Eastabrooke*, 3 *Ves.* 561. In *Chancey's Case*, 1 *P. Wms.* 408, the testator had directed that "all his debts and legacies be paid," and it was held this took the case out of the rule.

So, when the legacy is given *diverso intuitu*, some particular reason being expressed as the ground of the bequest. 2 *Wms. Ex.* 932. As in this case, where the reason for the legacy is stated evidently a gratuity in lieu of his interest in the estate as heir-at-law, distributee, &c., because he had been advanced and would be made equal with his co-heirs, &c., by the provision made for him in the will. That assumed equality would be destroyed if his rights as a creditor were taken away. These principles are also sustained by our own cases. It is held in *Owens v. Simpson*, 5 *Rich. Eq.* 420, that an express provision to pay debts would take the case out of the rule. Here there is an express direction to pay debts.

This exception is, therefore, sustained, and it is adjudged that

---

April Term, 1882.

---

the executors be allowed credit in their accounts for said payment.

3. The exceptions of plaintiffs, as to the items named in their fourth exception, is overruled. The testimony fully sustains the propriety of allowing these as credits to the executors.

4. The first exception of the plaintiffs claims that the funds used by the executors (\$2,191) to purchase a tract of land, which was conveyed by Mrs. Crews to J. W. Watts, as trustee for John D. W. Watts, as an investment of the legacy bequeathed to him in the seventh clause of the will, belonged to Mrs. Witherspoon and John D. Garlington, and that the land so purchased should be held for them, or at least charged in their favor to that amount, and that the referee should have so reported. The testimony established that \$800 of that sum was derived from a sale of a portion of the lands, which are collectively termed the Mill tract, disposed of by the ninth clause of the will, and also in part referred to in the codicil, and in the sixteenth clause of the will, revoked by the codicil.

In order to determine the question here presented, it is necessary to settle the order in which the legacies and devises stand towards each other, and from what sources the debts and pecuniary legacies are to be paid, and out of what property or fund the widow's dower should have been paid, and, indeed, all other questions respecting the administration and settlement of the estate. This decree is growing to such length that these important questions must be briefly determined. In the first place, it is adjudged that the dower is to be charged against the several parcels of land according to their respective values, and to be borne by devisees of lands devised, or paid out of the purchase-money of those parcels sold or to be sold, so far as such parcels may be chargeable with the same.

In *Cunningham v. Shannon*, 4 Rich. Eq. 140, Chancellor Dargan says: "Dower is a right which, inchoate during coverture, becomes absolutely vested in the wife, as an estate, on the death of her husband, and is as much beyond his control or power of disposition as her own inheritance. It not being his to give, every devise which he makes of the land, upon which the right of dower attaches, is presumed to be given subject to

## Circuit Decree.

the legal estate, unless the contrary appears on the face of the will in express words or by the strongest kind of implication." This is the principle—that the land is devised subject to the dower. The assessment for dower must, therefore, be paid by the devisees of the land or their proceeds, when sold. Whatever funds may have been actually employed in paying off this assessment, must be replaced by the devisees, or by the executors, out of the proceeds of land sold or to be sold, to the extent that they are liable to dower.

5. "In South Carolina, the whole estate is charged, by law, with the payment of debts; but in the absence of any special direction by the testator, certain rules have been adopted in the marshaling of assets, \* \* \* but a testator has the right to prescribe a law for the disposition of his estate, which is obligatory upon all claiming as volunteers. The inquiry always is, Has the testator expressed an intention to have his assets marshaled in a different manner from that prescribed by law? Does there appear from the whole testamentary disposition taken together, an intention on the part of the testator, so expressed as to convince a judicial mind that it was meant, not merely to charge the estate secondarily liable, but so to charge it as to exempt the estate primarily liable?"

This is the language of the late eminent Chancellor Dunkin, delivering the opinion of the Court of Equity Appeals in *Brown v. James*, 3 *Strobh. Eq.* 29. I have transcribed it here because in my opinion the testator has in this case clearly expressed an intention, and has prescribed a law, which will control the question as to what legacies are first to be resorted to for the payment of debts, upon the failure of assets undisposed of specifically, and otherwise primarily liable. Of course the general rule is that personal property not specifically bequeathed, is to be resorted to in the payment of debts, before specific legacies; and specific legacies, before real estate, devised. But lands devised under a general residuary clause are liable before a specific legacy. *Warley v. Warley*, *Bailey Eq.* 397; 2 *Hill Ch.* 457.

In the first ten clauses of his will the testator here has devised and bequeathed the great bulk of his estate. I presume there will be no question that all those devises and bequests are specific,

---

April Term, 1882.

---

except the pecuniary legacies bequeathed in the sixth clause to Washington A. Williams Anderson, and in the seventh clause to John D. Williams Watts, or, more accurately, in trust for them respectively. Standing alone, they would certainly not be specific. But in the eleventh clause of the will, testator evidently classed them with the other legacies and bequests, and considered them all together as a specific portion of his estate, carried out and set apart for the persons and uses therein declared. It seems to me clear that the law of this will is that the property and assets, passing under the eleventh or residuary clause, is liable for the payment of debts before any resort is had to the legacies and devises set forth and contained in the previous clauses of the will, and it is so adjudged.

In the ninth clause of the will it said in regard to the property therein devised, that in case neither Mrs. Witherspoon nor John D. Garlington desired to take it at a valuation, "then to be sold, and in either case, the proceeds to be divided as in the case of the residue of my estate in the eleventh clause of this my last will and testament." This disposition is to be considered still as specific, though to be divided as directed in regard to the general residue.

It has occurred to me that some question might be raised as to whether the property given to the widow for life reverts directly to the remaindermen when she renounced the same, or reverted to the estate until the termination of her natural life. In *Avelyn v. Ward*, 1 Ves. 420, Lord Hardwicke decided the principle when he said, he knew of no case "of a remainder or conditional termination over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before conditional termination; but if the precedent limitation by what means soever is out of the case, the subsequent limitation takes place." In the *Touchstone* (452) it is said: "If one devise his land to another in fee-simple, fee-tail, for life or years, and the devisee after the death of the testator doth refuse and waive the estate devised to him, in this case, and by this means the devise is (as to him) void, and by the refusal of a particular estate, the remainder will be accelerated, and an intended remainder may be converted into an executory devise."

## Circuit Decree.

So it is said by Mr. Jarman (in his treatise on Wills, p. 702,) that "Where real or personal estate is given to a person for life, with an ulterior gift to B., the gift to B. is absolutely vested, and takes effect in possession, whenever the prior gift ceases or fail." So in our own case of *Lesly v. Collier*, 3 *Rich. Eq.* 128, it is said, "If there be a legacy to one for life, with remainder to another, which remainder, on the death of the testator would be direct and vested and not contingent, and the person intended to be the tenant for life, dies in the life-time of the testator, \* \* \* it cannot be doubted that in such case, the legacy does not lapse, but on the death of the testator goes at once to him who, in the scheme of the legacy, was intended to be only a remainderman." According to these principles, the remaindermen, Mrs. Witherspoon and John D. Garlington, were entitled to the property devised and bequeathed to the widow for life, with remainder to them, from the time of her election to take dower, as if the devise had been directly to them; and it is so adjudged.

It will follow from what has been said, that the legacy to John D. W. Watts was not payable out of the proceeds of the lands devised to Mrs. Williams for life, and that to the extent to which that fund was so employed, compensation must be made to Mrs. Witherspoon and to John D. Garlington to the extent that their interests were affected by such payment. As already said, the property whose proceeds were applied in this manner was portion of that described and disposed of by the ninth clause of the will, and mentioned also in the codicil and in the sixteenth clause of the will. In the contingency that after the termination of the arrangement with Dr. Anderson, neither Mrs. Witherspoon nor John D. Garlington should desire to take the land at a valuation, the same was directed to be sold and the proceeds to be divided as in the case of the residue of the estate under the eleventh clause of the will.

By that clause it was directed that the rest and residue of the estate should be sold by the executors and the proceeds divided as follows: "One-fourth part to Col. James W. Watts and Dr. William Anderson, in trust for the sole and separate use of my said wife during her natural life, with the power on her part of disposing of the same to such persons as she may see fit, and the

---

April Term, 1882.

---

remaining three-fourths to be equally divided between my two daughters, Lucy and Phœbe, and grandson, John D. Garlington, so as to give my said daughters and grandson equal portions," &c., with a provision that on the death of either without leaving issue, the share of the party so dying to be divided among the survivors. There is here no disposition of the one-fourth bequeathed to the executors, in trust for Mrs. Williams, for life, with the power in her of disposing of the same at her death. Upon her renunciation of the bequest this provision for her benefit was no longer operative, and the fund which was the subject of it became assets in the hands of the executors, undisposed of by the will, as in the case of a lapsed legacy. *Coffin v. Elliott*, 9 Rich. Eq. 244.

As to three-fourths of the sum paid by the executors, from the proceeds of the land sold, which were distributed under the ninth clause of the will, "as in case of the residue," the plaintiff, Mrs. Witherspoon, and the defendant, John D. Garlington, are entitled to be re-imbursed out of the estate, and if that be not sufficient, then out of the land purchased by the executors with that fund, in part, for John D. W. Watts. The payment was authorized by the decree which authorized the sale for that purpose, but the rights of the parties were reserved.

The proceeds of the Milton Mills tract, the legacy in favor of the Crowders having failed, fall into the residue.

The devisees are entitled to rents and profits, as to the property devised to her for life, from Mrs. Williams' renunciation. As to the Simpson lands, from the termination of the arrangement made by the testator with Dr. Wm. Anderson, directed by him to be continued until January 1st, 1875, and as long after as should be desirable. As to White Plains, from the termination of the like arrangement with James W. Watts, as provided in the thirteenth clause of the will. As to Spring Grove, from January 1st, 1871. The personal property on these two last named places having been blended with them, and specifically devised with them as a whole, are to be considered as a part thereof.

The pecuniary legatees are entitled to interest from the expiration of one year from the death of the testator.

## Circuit Decree.

Mrs. Phoebe Y. Witherspoon and John D. Garlington are to be severally charged with the sums expended on their maintenance and education.

This brings me to the questions made by the answer of John G. Williams, involving the title to the Spring Grove plantation. I am unable to conclude that the claim is established. Testator placed his son John G. Williams in possession of Spring Grove in 1858, and he has remained continuously in possession ever since. Some time after he went into possession, and before the war of secession, testator proposed to his said son, to substitute White Plains, a more valuable place, for Spring Grove. Testator was desirous of getting his son away from Spring Grove on account of certain associations in that neighborhood which he deemed injurious to him. This proposition, though evidently advantageous to him, was rejected by John G.

On another occasion, about the year 1858, John G. Williams was about erecting a building for a residence on Spring Grove, and he and his father differed as to the site of the house. Testator closed the dispute by saying to his son, "It is your place and you can do as you please about it," and accordingly John's location was adopted. These buildings and other improvements were made, in part, by the assistance of the testator, who furnished workmen and some material. Fencing and other improvements were made on the place by John G., who used and cultivated it as if it were his own, from the time he entered into possession. In 1859 or 1860 testator said to J. F. Leak, a witness, who went to him to rent a portion of the land: "I have given all on the other side of Mudlick creek to my son John, and have nothing to do with it." On other occasions he spoke of Spring Grove as John's place, and said he had given it to him. John G. Williams also has in his possession the title-deeds and original grant of the Spring Grove lands, but it does not clearly appear when or how they came into his possession.

On the other hand, there is no evidence of the distinct assertion, by John G. Williams, of an independent and adverse title contrary to the will, until he filed his complaint, setting up his claim to such title, in September, 1875. He returned no real estate for taxation, and paid no taxes on Spring Grove until after

---

April Term, 1882.

---

testator's death. Neither of the executors, nor the members of the family, ever heard of such a claim on the part of John G. Williams, until after testator's death. The place was appraised as part of the estate of testator without objection. John G. Williams was a party to the two suits hereinbefore mentioned, that for dower, and the other for the sale of property to pay the dower, and in neither case did he deny that he held Spring Grove under the will, or assert any independent title thereto.

Considering all these circumstances in connection with the devise of Spring Grove by the testator, I find evidence that satisfies me that the possession of John G. Williams of the Spring Grove plantation, and other property connected with it, during the life-time of his father, was not adverse, but permissive, and understood to be in subordination to testator's title and his right to devise the same, and to define the intent and nature of the estate which it was the intention of both that he should take in the same.

Furthermore, I am satisfied that if the title had been such as now claimed by John G. Williams, the circumstances were such as to require him to elect between accepting the benefits of the will and claiming against it, renouncing those benefits. This election he made when he accepted the surrender and cancellation of his indebtedness to the estate under the provisions of the will, which, with the other benefits derived from the estate, and the advancements previously made to him, his father considered, made his equal with the other children of the testator. The remaindermen under the devise of Spring Grove would be entirely disappointed, if he held that place by an independent title. "It has been holden for an established principle of equity, that when a testator, by his will, confers a bounty on one person, and makes a disposition in favor of another, prejudicial to the former, the person thus prejudiced shall not insist upon his old right, and at the same time enjoy the benefits conferred by the will." *Melchor v. Burger*, 1 Dev. & B. Eq. 634.

John G. Williams accepted the provision made for him in the will, with a full knowledge of the facts. He was a party to the proceedings for dower, and allowed the amount assessed for the same on Spring Grove to be paid or provided for out of the estate,



## Circuit Decree.

and as a portion of the lands whereof testator died seized, and which he devised by his will. He was party to a suit, under which, with his consent, other lands devised by testator were sold to pay this dower, he having no interest whatever in such lands. I am compelled, under the circumstances, to conclude, that if this were a case of election, his conduct amounts to a deliberate choice to accept the provisions of the will as absolute and to abide by them. Having done this he cannot recant. *Buist v. Dawes*, 3 Rich. Eq. 301. It is there said that whenever an election has been made, either at law or in equity, it is a satisfaction of the alternative right, and that the party will not be allowed to retract, unless upon grounds of equity shown to exist, inherent in the circumstances. There are none such here.

The conclusions which have been announced, require that the dower be paid out of the specific lands upon which it was assessed, or out of their proceeds, if sold; that to the extent that other funds have been employed for that purpose, compensation be made by the owners of the land, or the persons entitled to the proceeds of land sold. That, if required for the payment of debts, the legacies and devises abate, after the exhaustion of property and assets not disposed of by the will in consequence of lapse or renunciation of the widow, resort shall first be had to the property and assets which fell into the residue of the estate and passed under the eleventh clause of the will. That, if necessary that the other devises and legacies abate, they contribute equally, *pro rata*, without any preference between them according to their value at the time when the right of possession or of payment accrued. That, if necessary, the residuary legatees contribute to the payment of the pecuniary legacies. That in all cases compensation shall be made according to the principles herein declared, when funds have been applied contrary to these principles.

As to the demands of the plaintiffs that the executors be suspended from their office and the estate taken out of their hands, no case has been made which would authorize the court to interfere with the wishes of the testator in this respect.

I do not perceive the propriety of withholding the enjoyment of the property devised and bequeathed to the plaintiffs, Mrs.

---

April Term, 1882.

---

Witherspoon and John D. Garlington on account of the outstanding debts. There has been sufficient time to ascertain and discharge them.

It is therefore ordered and adjudged that the lands of the testator, John D. Williams, remaining unsold, which were directed to be sold by the decree of the court heretofore made for the purpose of paying the dower and the pecuniary legacies, be sold by the master on the first Monday in February next, or some convenient salesday thereafter, at public auction, after first duly advertising them on the terms following, to wit, one-third cash, the balance on a credit of one and two years, to be secured by the bond of the purchaser and a mortgage of the property, and that the same be sold in such convenient parcels as may best promote the interests of the estate. That the proceeds of said sale be held by the master subject to the provisions of the will and the provisions of this decree, to be paid out under the order of this court. That a writ of partition do issue to commissioners to be named therein, directing them to divide the White Plains plantation, with the personal property of the estate thereon belonging to the estate, into two equal parts, respect being had to the value thereof, and to assign and allot in severalty to the plaintiff, Phoebe Y. Witherspoon, and to John D. Garlington one equal share or moiety thereof, according to law and the usage and practice of this court. That the said property, notwithstanding such partition, stand charged in the hands of the said parties with the payment of the debts of the estate, to the extent to which the same may be liable to contribute according to the principle herein adjudged, and also liable for and charged with the payment of such sums as may be adjudged against the parties to whom the same is allotted, in order to adjust the accounts between the parties to this action. That it be referred to the master to restate the accounts of the executors, and between the parties, according to the requirements of this decree and the principles herein announced. That it be referred to the master to take testimony and report a scheme for the payment of the debts of the estate, ascertaining what funds are available therefor, and how much thereof is necessary to be set aside for

---

Exceptions.

---

that purpose, and that he report a scheme for the final settlement of the estate in accordance with this decree.

It is ordered and adjudged that the exceptions to the rulings of the referee as to the admissibility of the testimony of A. Y. Miller and of C. M. Miller, and also as to the admissibility of the record marked Exhibit A., be sustained. The other exceptions to the evidence are overruled. It is to be remarked here that those exceptions were not specific, but so general as to throw upon the presiding judge the labor of searching through the whole case to ascertain what objections were included in the general terms employed. Nor were they made more specific in the argument; under these circumstances they might have been disregarded by the court.

It is ordered that the costs of this suit be paid by the executors out of the estate of the testator.

It is not intended that the executors should await further proceedings under this judgment before proceeding with their duties, but they are ordered to proceed to realize and collect the assets of the estate and to settle the debts and the legacies as far as they may have assets for that purpose, observing the order of such payments and the proper application of funds as adjudged herein. And all restraining orders heretofore issued, prohibiting such collections and payments, are hereby revoked and overruled, or to that extent modified.

From this decree all parties gave notice of appeal to the Supreme Court. The plaintiffs and John D. Garlington appealed upon exceptions alleging error:

1. In decreeing that the defendant executor, William Anderson, was not jointly with his co-executor chargeable with the items of \$1,776.50 and \$1,176.74 charged against him in the report of the referee.

2. In overruling plaintiffs' exceptions to the report of the referee as to allowance to executors of commissions on the rents received by them.

3. In not sustaining plaintiffs' exceptions to the referee's report, that the referee should have reported that the accounting herein was not final, but that a large amount of choses in action, as well as other property of the estate, were still in execu-

---

April Term, 1882.

---

tors' hands, and should be accounted for hereafter, and that the accounting of the executors on their copartnership with the estate as to the White Plains and Mill places was still open for a future accounting.

4. In not requiring the executors to give bond for the faithful discharge of their duties, or, failing in that, in not putting the assets of said estate in the hands of a receiver.

5. In holding that by renunciation of devise by testator's widow, there was a lapse in the devise of one-fourth of the land mentioned in the ninth clause of the will; whereas, it is respectfully submitted that his Honor should have held that by said renunciation, the whole thereof went to Phœbe Y. Witherspoon and John D. Garlington.

6. In not holding that the land purchased for John D. Williams Watts, was charged in favor of Phœbe Y. Witherspoon and John D. Garlington, with the sum of \$2,192 with interest from the 29th December, 1879.

7. In holding that, if necessary, the other devises and legacies abate, and that they contribute equally *pro rata* without any preference between them, according to their value at the time when the right of possession or of payment accrued.

8. In not holding that the specific devises and legacies in favor of Mrs. Phœbe Y. Witherspoon and John D. Garlington should first be paid in full before any payment could be made towards the pecuniary legacy in favor of Washington A. Williams Anderson and John D. Williams Watts.

9. In directing a sale of the mill tract of land before it was ascertained that any debts were owing by the estate, or that the funds in the hands of the executors were insufficient to pay the same.

10. In not decreeing that the value of the dower of testator's widow in the Spring Grove tract of land, together with the interest thereon from the time of testator's death, should be paid by John G. Williams to Phœbe Y. Witherspoon and John D. Garlington, and that the same was a lien or charge upon the life-estate of the said John G. Williams in said tract of land.

11. In not holding that the plaintiffs and John D. Garlington are entitled to all the rents in their hands specifically devised

---

Exceptions.

---

to them, and also of least three-fourths of the rents of the real estate specifically devised to them under the will from the death of testator until the election by the widow to take dower in the real estate of testator.

12. In not holding that Phoebe Y. Witherspoon and John D. Garlington were entitled to rents of all the real estate not specifically devised until the actual sale of said real estate.

13. In not holding that Lucy has no estate under the testator's will as claimed by John G. Williams.

14. In not holding that the plaintiffs, Phoebe Witherspoon and John D. Garlington, were entitled to the — bales of cotton rents in hand of the executors at time of said decree.

John G. Williams' exceptions are as follows :

1. Because the evidence shows that this defendant had held Spring Grove adversely under parol gift from his father, John D. Williams, for more than two years prior to his death, and that defendant had not estopped himself from setting up this title. His Honor erred in not so finding.

2. Because this defendant is not bound to pay the assessment in lieu of dower in Spring Grove, but it should be paid by executors out of the estate devised and bequeathed to the widow, in lieu of which she elected to take dower. His Honor erred in not so finding.

3. Because the defendant, as administrator of the personal estate of Lucy Williams, deceased, is entitled to an account by the executors of the rents and profits from the estate of John D. Williams, deceased, from his death to hers, and to receive one-third thereof, after deducting the amount expended for her support. His Honor erred in not so finding.

4. Because this defendant is entitled, as administrator as aforesaid, to one-third of the proceeds of sale, and assignment of the homestead and personal property thereon, under the provisions of the second and eighth clauses of John D. Williams' will. His Honor erred in not so finding.

5. Because said decree is in other respects contrary to the law and evidence.

The infant defendants, by their guardian *ad litem*, and the executors, excepted to said decree :

---

April Term, 1882.

---

1. Because his Honor erred in holding that the sum of \$800 paid for the purchase of a tract of land for J. D. W. Watts, was derived from the proceeds of the sale of a portion of the lands of the testator known as the Mill tract, and sold to William Mills.

2. The defendant executors, and B. W. Ball, guardian *ad litem*, respectfully submit that his Honor erred in not holding that, the property devised to the life tenants, and conditionally to certain devisees, as referred to the residuary clause to pass thereunder, should abate with the property passing under the residuary clause.

*Messrs. J. S. R. Thomson, James Farrow, for plaintiffs.*

*Mr. J. W. Ferguson, for J. D. Garlington.*

*Mr. J. J. Norton, for J. G. Williams.*

*Messrs. Holmes & Simpson, for executors.*

*Messrs. Ball & Watts, for executors, J. G. Williams, and the infant legatees.*

May 12th, 1883. The opinion of the court was delivered by

MR. JUSTICE ALDRICH. I have been so continuously engaged since the hearing of this case and *Pope v. Mathews*, that I have not had time to prepare the opinions. My circuits last year were the Eighth, First and Second, which are three of the largest in the State; the business had accumulated and the chambers business on my own circuit was more than usually pressing. As I think my first care is to my circuit duties, I have not had the time to devote to the extra call of the Supreme Court, before now.

The appeal from the exhaustive decree of Judge Kershaw, who heard the cause, presents several interesting questions, which he has so clearly stated and discussed that it will not be necessary to encumber this opinion by a statement of the same.

The first question to which the learned judge addresses himself, is the balance due by J. W. Watts, which is charged by the

---

Opinion of the Court.

---

referee to both executors, Watts and Anderson. Undoubtedly the rule is, that one executor shall not be responsible for the assets which came into the hands of his co-executor. This is a question of fact, and the Circuit judge, after a full hearing and a mature consideration of the evidence and argument, has decided that it is properly chargeable only to the executor J. W. Watts. I see no reason to dissent from his conclusion of law and fact. See Circuit decree and authorities there cited.

From the evidence, it does appear that there are assets still in the hands of the executors, and there should be an accounting for the balance yet to be administered. It is so ordered.

Next, as to the appointment of a receiver. When a testator, in the most solemn act of his life, deliberately selects two of his friends to act as his executors, his wish is to be regarded, and the appointment he thus makes is not lightly to be set aside. He does not select them because of their ability to respond, but for their integrity and the trust and confidence he has in their friendship and honor. In this case, the testator well knew that these gentlemen were in moderate circumstances, if not insolvent; that the ample estate he was entrusting to their charge, if wasted, would be irrevocably lost and his bounty to his wife and children defeated. With these facts before him, he trusts them with his all, in full faith and confidence that these objects of his love and bounty will not be defrauded by his life-long, trusted friends. Are we to close our ears to this voice from the grave, and say, "You have made a mistake; your friends are not to be trusted," and thus condemn the judgment of the dead and cast a reproach upon the living? An executor may commit errors in his accounts, make mistakes in his construction of the will; these the court will correct, but will not remove the executor unless there is willful misconduct, waste, or improper disposition of the assets, as is said in *Wms. Ex.*, and approved in our own court, in *Stairly v. Rabe*. The decree of the presiding judge is sustained.

Testator died in 1870. In April, 1873, two years and ten months after, the widow, Mrs. Anna E. Williams, renounced her interest under the will, and elected to take her dower. The proceedings in dower were had in the Probate Court, and the executors directed to pay her \$12,400, the assessed value of the

---

April Term, 1882.

---

dower. The only question here is, How is this dower to be assessed? Dower being that estate which the wife has in the lands of which her husband was seized during coverture, it seems to me there can be no question she is entitled to have it assessed in each particular tract of land of which the testator was seized. And if, instead of assigning her the land, one-sixth of the value thereof is admeasured to her, as in this case, it follows that each tract must contribute its proportion of value. For as, if the land be assigned, she takes one-third, for life, in land, that is, the land from which it is admeasured, so, when money is assigned, the land which the money represents is the land out of which the money is to be raised.

The moment the widow renounced her interest under the will, she stood as much a stranger thereto as if she had not been mentioned in that instrument. She was entitled to her legal estate and entitled to it out of the land, no matter who is in possession, or how long and for what consideration, before his death, the husband had aliened it. It makes no difference what disposition the testator has made, he could not divest her of her legal estate, favored by the law, by giving her a legacy, and, when she renounced the legacy, the only way in which she could receive her dower was out of each separate tract of which he had been seized; or, if the admeasurement be in money, then the land representing the money is liable therefor. The Circuit judge is right in ordering, "the assessment for dower must, therefore, be paid by the devisees of the land or their proceeds, when sold. Whatever funds may have been actually employed in paying off this assessment, must be replaced by the devisees, or by the executors, out of the proceeds of land sold or to be sold, to the extent that they are liable to dower." And this is manifestly the rule, for if the dower be paid out of the general estate, it may absorb the assets and thus defeat creditors and specific legatees.

The next question is, Are the legacies in trust for Washington A. Williams Anderson and John D. Williams Watts general or specific? If the clauses in the will in which these legacies are made stood alone, undoubtedly they would be general. But the will is the law of the case. Now, what did the testator



---

Opinion of the Court.

---

intend? There was no doubt in his mind that each of these boys would receive every cent of the bounty he intended for them, as evidence of his affection for the sons of his trusted friends, who had named them after his deceased son and himself. He was a man of ample means, had an estate that far exceeded his pecuniary liabilities. In disposing of it, he bequeathed the great bulk of all he possessed in the first ten clauses of his will. Then, to show the nature of these bequests, how he regarded and intended them, he calls them specific legacies, by using this emphatic language, "having specifically disposed."

It is the province and the rule of the courts to give effect to every clause of a will, and always to carry out the intent of a testator, when that intent can be ascertained. That he intended them to have this pecuniary legacy, is clear; that he knew there was ample property to pay, is equally clear; but, to make his bounty and his meaning certain and unfailing, he uses the significant expression, "specifically disposed." The testator was a man of large business capacity, an educated gentleman, a "pretty good lawyer," as he is described. Is it to be supposed that such a man used the expressive words, "specifically disposed," at random, without a purpose? I think not. He intended to make those legacies specific, and that the youths should be the recipients of his bounty, beyond a peradventure. The Circuit judge is herein sustained.

The last important question is as to the Spring Grove place. Did John G. Williams have title to this tract of land? The testimony is so full and the reasoning of the decree so conclusive, that it is unnecessary to enlarge on this topic. It is very clear the testator never regarded the land as the property of his son, and never intended it to be subject to his creditors. His wish to induce his son to remove from the place, his disposition of it in his will, is conclusive that he did not suppose he had given the land to John G., or that he had acquired title thereto. And John G. knew that as well as his father.

These are the main points in the case. The other questions are satisfactorily disposed of in the Circuit decree.

The appeal is dismissed.

---

April Term, 1882.

---

## STATE SAVINGS BANK OF ANDERSON v. HARBIN.

Where a debtor mortgages his entire real estate, and subsequently a judgment is recovered against him, the judgment creditor has the equitable right to compel the mortgagor to first exhaust so much of the debtor's land as embraces the homestead. FRASER, A. A. J., dissenting.

---

Before HUDSON, J., Anderson, July, 1881.

In this case Honorable Thomas B. Fraser, of the Third Judicial Circuit, sat in the place of Mr. Justice McGowan, who had been of counsel in the cause.

The Circuit decree thus states the case :

On July 22d, 1880, the plaintiff, a corporation, filed the aforesaid complaint to foreclose a mortgage on the real estate of Morgan Harbin, and to this action made the other defendants parties, as claiming an interest in said property by virtue of liens held thereon by mortgage and judgment. The parties defendant holding liens answered and claimed, by way of affirmative relief, that their respective liens be foreclosed or enforced, and the same satisfied out of the proceeds of the sale of defendant's land in the order of priority and legal right.

In his answer, the defendant, Harbin, interposes a claim of homestead, which claim is resisted by the defendants, or some of them. Morgan Harbin is the head of a family, and owns no real estate except that described in the complaint, and is thus fully qualified constitutionally to claim a homestead out of the land described in the complaint. The question is whether he has not deprived himself of the right of homestead as against the aforesaid creditors.

The following are the facts found, and about which there seems to be no dispute: On January 23d, 1875, the defendant, Morgan Harbin, executed and delivered to his co-defendant, D. Arrington, his note, and, to secure its payment, a mortgage on all his lands, including the tract whereon he lived—the note

## Circuit Decree.

being for \$300, with interest at the rate of one per cent. per month. On January 29th, 1877, he gave to the plaintiff, the Savings Bank, his note for \$1,535 at the legal rate of interest, and, to secure its payment, he executed and delivered to the bank a mortgage on that part of his land known as the Bolt tract, and furthermore, as collateral security for the note, he delivered to the bank a note due by W. F. Parker for the sum of about \$800. This Bolt tract contains 324 acres, and lies adjacent to the Home tract of 276 acres, and the two really form one body of land, though consisting originally of two tracts, and still retaining different names. On March 1st, 1878, Joseph N. Brown, as administrator of the estate of E. M. Brown, deceased, recovered judgment against Morgan Harbin for \$59.46, and \$6.15 of costs. On February 19th, 1879, Harbin gave his two promissory notes for the aggregate sum of \$167.98 to M. W. Coleman & Co., with interest at the rate of twelve per cent. per annum, and, to secure the same, executed and delivered to them a mortgage on all the lands aforesaid. On March 17th, 1879, the defendants, G. W. Maret and P. S. Mahaffey, as executors of the last will of John Coates, recovered judgment against Morgan Harbin for \$798 and costs.

All the aforesaid mortgages are free from objection as to form and date of recording, the first and last constituting a lien on all Harbin's land, and the second only on the 324 acres or Bolt tract. The judgments are likewise free from objection as to form, were duly entered up, and constitute a general lien on the real estate of Harbin, and the cause of action in each judgment as well as mortgage arose subsequent to the adoption of our present constitution. The judgment in favor of the executors of Coates is the junior lien of all, but the cause of action is perhaps of older date, being in 1872. The tract of land mortgaged to the plaintiff, the 324 acres Bolt tract, has already been sold under a former decree of foreclosure and sale in this cause, all equities being reserved, and brought \$1,410.

The questions raised in the pleadings and argument for the determination of the court involve conflicting equities between the creditors by judgment and mortgage as against each other, and Harbin. In behalf of the judgment creditors, it is contended

---

April Term, 1882.

---

that they, having a right to enforce their liens only against so much of the land as is in excess of Harbin's homestead, have an equity to compel the mortgage creditors first to exhaust that homestead over which they have a lien and right of enforcing it, before they can be permitted to receive any part of the proceeds of the sale of the land in excess of the homestead.

It is needless to cite authority for the proposition that when one creditor has two funds to which he can resort for payment, whilst another creditor can resort to but one of them, equity will force the first creditor to exhaust in the first instance that fund to which the latter cannot resort, before he is suffered to share in the fund common to both. This well-established rule settles the equities in this case as between the judgment creditors and those holding mortgages. As between these two classes of creditors the mortgagees are in equity bound to exhaust the homestead before resorting to the excess. This applies specially to the first and third mortgagees, who hold liens on all the land.

As to the plaintiffs, the second mortgagees, they are compellable first to exhaust the note against Parker, and for any balance then due and unpaid, they have an equity to be first paid out of the Bolt tract, except as to what the homestead and home place want in paying Arrington. Should the home place of 276 acres fail to pay Arrington, for the deficiency he will have precedence of the plaintiff on the Bolt tract, and for that deficiency alone.

But the claim raised by the defendant Harbin, is the most perplexing. He claims an equity to have his homestead admeasured as against all the creditors; that the mortgagees cannot resort for payment to this homestead until they have exhausted the excess, and that judgment creditors can in no event sell his homestead nor force others to do so. So far as we know or remember this interesting question has not been decided by our Supreme Court. It has, however, been raised and determined by the courts of last resort in several of the States, but with a conflict of opinion—the courts of some States maintaining the equity of the homestead claimants and others denying it. These conflicting decisions will be found collated in *Thompson on Homesteads and Exemptions*, §§ 656–666.

The leading case cited by the learned author, and the one

## Circuit Decree.

which he seems to found the rule upon, is the case of *Searle v. Chapman*, 121 Mass. 19. In a note to section 656 will be found a full extract from the opinion of the supreme judicial tribunal of Massachusetts, delivered by Chief Justice Gray. In that case, in an action by a mortgagee to foreclose his mortgage, the mortgagor claimed the equity to compel the mortgagee to exhaust all the excess of land before selling that which should be admeasured as a homestead to defendant. The court below denied the equity, and the supreme judicial tribunal sustained the judgment in the aforesaid learned opinion, holding in substance that the homestead claimant is bound by his conditional sale of the homestead; and that "as against him, the mortgagee has the right to enforce the contract according to its terms and is not bound to elect between different remedies or securities."

Mr. Thompson says that the same doctrine prevails in Kansas; but that in some of the other States this equity of the mortgagor is recognized and enforced. In section 657 the author says: "If this is a sound rule where the only parties affected by it are the mortgagor and mortgagee, it becomes more imperative where to deny it would prejudice the rights of third parties, such as judgment creditors of the mortgagor. It then becomes a rule for the application of the familiar rule of equity, that when a creditor has a claim upon two funds, upon one of which another creditor has also a claim, and such other person will be prejudiced by allowing such creditors to satisfy his debt out of the fund subject to both claims, a court of equity will compel the creditor to take satisfaction out of the fund to which he alone has a claim, in the first instance. He must exhaust that fund before resorting to the other. He must foreclose his mortgage on the homestead before he can claim the right to share with general creditors, as to any unsatisfied balance, in the proceeds of the sale of his mortgagee's estate." In support of this position he cites *White v. Polleys*, 20 Wis. 530, a leading case which induced the legislature of Wisconsin to pass a special act to meet such an emergency, and to protect the equity of the homestead claimant.

We think that in the absence of a statute of like character in our State, the doctrine of *Searle v. Chapman*, and *White v. Polleys*, is the true rule, and in perfect accord with fairness and good

---

 April Term, 1882.
 

---

faith. Were a different rule to be applied to the case now under consideration, its hardship and unfairness would be manifest. It would authorize a man owning real estate largely in excess of a homestead to obtain credit upon the faith of that excess, perhaps to the full extent of its value. After these claims have been sued, but before judgment, additional credit of an equal amount is obtained on the faith of a mortgage of the same land. In an action to foreclose the mortgage to which the judgment-creditors are parties, it would be in violation of all ideas of justice and equity to hold that the mortgagee could be compelled to shift the lien of his mortgage off the homestead, and first exhaust the excess and thus entirely defeat the judgment debts on contracts senior to the mortgage debt.

In our opinion the debtor, Harbin, having several times conveyed away his homestead by way of mortgage, has no equity now to compel the mortgagees to refrain from selling his homestead, especially since it would work injustice and hardship to the judgment creditors who are co-defendants in this action. It is therefore ordered, adjudged and decreed—

1. That it be referred to the master of this court to ascertain and report the amount of principal, interest and costs due upon the judgments and mortgages aforesaid respectively.

2. That the defendant, Morgan Harbin, have until the first Monday of November next in which to pay the said mortgage debts, and that, in case of his failure so to do, the master of this court, having first duly advertised the same, according to law, for sale, &c.

3. That by said sale the said Harbin and all persons claiming under, by or through him any interest in said premises, shall be forever barred and foreclosed of any equity of redemption in and to said land, and the same shall likewise be by said sale free and discharged of any and all lien of said judgment creditors thereon.

\* \* \* \* \*

5. That before sharing in the proceeds of the said sale herein ordered and that already made, the plaintiff, the Savings Bank of Anderson, must first exhaust its remedy on the note of W. F. Parker and apply the proceeds thereof to the payment *pro tanto* of its debts against Harbin, and only for any balance remaining

---

Exceptions.

---

thereafter shall said plaintiff share in the proceeds of the mortgaged premises.

6. That out of the gross sale made and to be made, shall first be paid the costs of said sale and of this action.

7. Subject to the above restrictions, the net proceeds of the sale of said land sold and to be sold, shall be distributed as follows, viz.: 1. To the payment in full of the senior mortgage debt. 2. To the mortgage debt next in seniority in full, if the Bolt tract will pay so much. 3. To the Brown judgment in full. 4. To the mortgage debt of M. W. Coleman & Co. in full. 5. To the judgment of the executors of Coates in full. 6. That should a balance be left, it be applied to any balance of the plaintiff's demand remaining unpaid from proceeds of said note and the Bolt tract, and for any such balance an execution may be issued. 7. Should a surplus still be left, the same must be paid to the defendant Harbin, his agent or attorney.

8. That the parties are at liberty to apply for any further administration order, at the foot of this decree, to carry the same into effect and in furtherance of the cause.

From this decree the defendant, Harbin, appealed in words following:

The defendant, Morgan Harbin, admitting the right of every party to this action who is a lien creditor, to have his homestead sold, if necessary for the payment of their respective liens, except the judgment of the defendants, Maret and Mahaffey, as executors of the will of John Coates, deceased, appeals from the decree of his Honor, Judge Hudson, filed in this action on July 5th, 1881, on the following ground, to wit:

Because his Honor erred in adjudging that the defendant, Morgan Harbin, was not entitled to have his homestead set off as against the judgment of Maret and Mahaffey, executors, because he had created a prior lien thereon by mortgage to other persons of that and other surplus land, enough to pay off such prior liens, adjudging the equity of said judgment creditors to compel the prior mortgagees to go upon the homestead for the collection of their mortgage debts, so as to leave the surplus liable to sale for the payment of said judgment, superior to the equity of the debtor, Morgan Harbin, to require the mortgagees

---

April Term, 1882.

---

to exhaust the surplus in the payment of their debts, so as to leave him in the enjoyment of his homestead.

*Mr. J. J. Norton*, for appellant.

The appellant is entitled to his homestead as against the judgment of Maret and Mahaffey. *Const. of S. C., Art. II., § 32; 15 Stat. 369.* The land must be sold in parcels, and only so much as is necessary to pay the mortgage debts, leaving out the homestead. *Fifty-third Rule Circuit Court; Smyth Exemp., § 276.* If the parcels outside of Harbin's homestead pay the prior liens, then it cannot be sold to pay Maret and Mahaffey's judgment.

*Messrs. R. A. Thompson, Wells & Orr*, contra.

April 17th, 1883. The opinion of the court was delivered by MR. JUSTICE McIVER. The facts of this case are so fully and clearly stated by the Circuit judge, that it seems unnecessary to repeat them here.

It is conceded that the question raised by this appeal is novel in this State, and that the authorities elsewhere are conflicting. It is necessary, therefore, to consider the general principles applicable, and from them to deduce the proper conclusion. There is no dispute as to the general rule, that where there are two creditors of a common debtor, one of whom has a claim or lien upon two funds, and the other upon only one of these funds, that the latter has an equity to require the former first to exhaust the fund upon which he has no claim or lien. The only qualification of this rule, laid down in the elementary writers, is that it will not apply where the creditor having the lien upon the two funds will be injured or delayed by its application. 1 *Story Eq. Jur.*, § 633 *et seq.* This rule is for the benefit of the creditor only, and cannot be invoked in behalf of the debtor unless some peculiar equity springs up from other circumstances, as, for example, where the debtor occupies the position of a surety.

I am unable to perceive any reason why this well settled and universally acknowledged rule should not be applied to the present case. There is no suggestion that its application would



## Opinion of the Court.

tend to injure or delay the creditors having liens on the two funds. All the parties are before the court, and the only objection proceeds from the common debtor, who does not occupy the position of a surety, and I do not see any equity on his part to interpose an objection to the application of the rule. His right of homestead is not an estate, but is a mere right to have a certain portion of his property "exempt from attachment, levy or sale, on any mesne or final process issued from any court."

If he has voluntarily stripped himself of this protection which the law has thrown around him, by twice mortgaging the land, out of which he would otherwise have been entitled to claim a homestead, he cannot complain at a result brought about by his own act, and he certainly has no such equity as would protect him from the operation of the rule above stated. The only creditor who would be likely to suffer under a different conclusion, is one who seems to have extended credit to the appellant before there were any liens upon any of his property, and it would seem to be manifestly inequitable that this creditor should suffer from an indulgence extended to the appellant, perhaps, in reliance upon a well settled and universally acknowledged rule.

All the authorities seem to concede the proposition that, as between the debtor and his mortgagee, the former has no equity to require the latter first to exhaust the other property embraced in the mortgage before he can go upon that out of which homestead is claimed, and, as Mr. Thompson, in his work on homesteads, section 657, well remarks: "If this is a sound rule where the only parties affected by it are the mortgagor and mortgagee, it becomes more imperative where to deny it would prejudice the rights of third parties, such as judgment creditors of the mortgagor." It would, indeed, be a strange perversion to deny the equity claimed by the debtor in a case where its application would injure no one, and yet allow it in cases where innocent third persons would be the sufferers.

The analogy drawn from the case of a devise of lands to charitable uses, does not seem to me to be complete. Creditors stand upon much higher ground than devisees or legatees, and the reason given by Lord Hardwicke, in *Mogg v. Hodges*, 2 Ves.

---

April Term, 1882.

---

53, for not applying the rule in a case of a devise to charitable uses is, "that a court of equity is not warranted in setting up a rule of equity contrary to the common rules of the court, merely to support a bequest which is contrary to law." In the case now under consideration, it is not proposed to set up the rule of equity as to a creditor having a lien upon two funds for the purpose of securing the payment of an illegal debt, or "to support a bequest which is contrary to law," but simply to provide for the payment of a just debt, subject to no legal exception whatsoever, not out of property exempt by law, but out of property liable for its payment, by throwing another debt upon the homestead property, which the debtor has voluntarily subjected to its payment by giving a mortgage on it.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

MR. CHIEF JUSTICE SIMPSON concurred.

MR. JUSTICE FRASER, *dissenting*. I am unable to concur in the judgment of the majority of the court in this case. The single question presented by this appeal is whether Maret and Mahaffey, executors, judgment creditors of Morgan Harbin, have the right to compel the mortgagees, Arrington and Coleman & Co., who have prior mortgages of the Home tract of land, the homestead of Morgan Harbin, as well as of the Bolt tract of land, to sell the homestead and apply the proceeds to their mortgage debts, so as to leave the Bolt tract for the payment of their judgment. It is not a question here whether these mortgagees have a right, as between themselves and the mortgagor, to demand that the homestead shall be sold before the surplus land, but it is whether the mortgagees, against their will, can be compelled, at the suit of the judgment creditor and for his benefit, to sell the land in that order.

The application of the doctrine of marshaling assets forms one of the most useful, and at the same time most delicate, branches of equity jurisdiction. It depends on this principle: "That a person having two funds to satisfy his demands, he

## Dissenting Opinion.

shall not, by his election, disappoint a party who has only one fund. If, therefore, a person having a claim upon two funds chooses to resort to the only fund upon which the other has a claim, that other person shall stand in his place for so much against the fund to which otherwise he could not have access." 2 *Lead. Cas. Eq., H. & W., Pt. I., p. 151*; *Aldrich v. Cooper*, 8 *Ves.* 382. The doctrine is not confined to claims of creditors, and it is no peculiar equity to which they are entitled. It extends to the widow's paraphernalia (*Id.*, p. 156), to purchasers (*Id.*, p. 171), to legatees and devisees (*Id.*, p. 180), and sureties who are no more than debtors as between themselves and those to whom they are bound as such, will be subrogated to all the rights of the creditor on payment of the debt. *Id.* 166.

In cases of devises of land to charitable uses, Lord Hardwicke, in *Mogg v. Hodges*, 2 *Ves.* 53, says: "That a court is not warranted in setting up a rule of equity, contrary to the common rules of the court, merely to support a bequest which is contrary to law," and he refused to throw the payment of debts and ordinary legacies on the real estate, so as to leave the pure personalty for the charity. *Id.* 157, 191, 192; 2 *Story Eq. Jur.*, § 1180. In the note at pages 191 and 192, in *Leading Cases in Equity*, it is said to be "well settled that where a devise of lands to charitable uses is prohibited by law, equity will not sustain a bequest to a charity by marshaling the assets, so as to throw the burden of the testator's debts on the land, for this would be contrary to the spirit of the legal prohibition."

Article I., section 20, of the constitution of this State, provides that "a reasonable amount of property, as a homestead, shall be exempted from seizure and sale for the payment of any debts or liabilities." Article II., section 32, defines the homestead, and provides that "it shall be the duty of the General Assembly, at its first session, to enforce the provisions of this section by suitable legislation." In pursuance of this injunction, an act was passed at the first session, and from time to time it was amended. The act of 1873, § 5 (15 *Stat.* 371): "No waiver of the right of homestead, however solemnly executed, shall be binding upon the head of the family, or in case of his or her death, his or her heirs, so as to defeat the homestead herein pro-

---

April Term, 1882.

---

vided for." By section 10 of the same act, it was made a misdemeanor in any officer to sell any property in violation of said act, and article II., section 32, of the constitution.

Thus stood the law at the time the liens in this case were acquired. The creditor or other claimant having only one fund is simply subrogated to the rights of a creditor who has two funds, as to the fund to which he is allowed to resort for payment. When, as in this case, the judgment creditor is put by the court in the place of the mortgagee as to the homestead, it is clearly against the spirit of the constitution and the statutes in reference to the homestead, that he shall be allowed to subject the homestead to his claim. The mortgagee certainly had a right to mortgage, and even convey in fee-simple, to whom he pleased, his homestead. But in this case he may well say, I have made no such agreement and I have not even waived my right to the homestead in favor of the judgment creditor.

If the Court of Equity will refuse to marshal assets so as to make a charity indirectly a charge on real estate by throwing creditors on the land and leaving the personalty for the charity, because it would be against the policy of the law, the same reason should induce this court, it seems to me, to refuse to marshal the funds in this case so as to make a judgment indirectly chargeable on the homestead, when such homestead is not only exempt by law, but the head of the family is not allowed to waive the right thereto, and the officer forbidden, under heavy penalties, to sell the same.

If the principle on which the judgment of the Circuit Court rests is properly applicable to such cases, then there can be no case in which a homestead could not be sold to pay all outstanding debts, as soon as the head of the family who happens to own other property, ventures to mortgage the homestead and other property, to secure any one of them, or to raise money to meet the exigencies of the family.

It is a new question in this State, and in other States where a homestead law has been longer in existence, the decisions are conflicting. In *Searle v. Chapman*, 121 Mass. 19, the mortgagee brought his action against the mortgagor for foreclosure, and the mortgagor set up a claim as against the mortgagee to

---

Dissenting Opinion.

---

compel him to sell the surplus first, so as to save the homestead. In this case there was a release by the husband and wife of all claim of homestead and dower. The court refused to sustain the defense. In Massachusetts, "as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee," which "gives the mortgagee a remedy in the form of a legal action." Shaw, C. J., in *Ever v. Hobbs*, 5 Metc. 1-3, and *Howard v. Robinson*, 5 Cush. 119-123. It is true that in Massachusetts as to all other parties, as in this State, a mortgage is a mere security for the payment of money, but this difference of view as to the nature of a mortgage, ought to induce this court to hesitate to adopt the conclusions in that case, and to regard it as not sufficient authority for the inference for which it is quoted at the bar as authority in this case—that a judgment creditor has the right to compel the mortgagee to sell the homestead before the surplus. In *Searle v. Chapman*, the court simply declined to interfere with the rights of the mortgagee.

This distinction has been recognized in Kansas. In the case of *Chapman v. Lester*, 12 Kan. 592, it was held, "that when a person mortgages his homestead, together with other realty, there is no such implied obligation on the mortgagee first to exhaust his remedy on the realty other than the homestead, as will prevent him from releasing such other realty other than the homestead, and still retaining his lien on the homestead." And in a later case of *Colly v. Crocker*, 17 Kan. 527, it was held that the grant of a specific lien upon the homestead to secure a specific debt, does not amount to such a waiver of the homestead right, that an unsecured creditor can procure it to be sold in a proceeding for the marshaling of assets. In this case of *Colly v. Crocker*, a husband and wife mortgaged the homestead and other real estate to A. B. obtained a judgment upon the other property excepting the homestead, and then the husband sold a piece of property covered by the judgment and mortgage lien to C. The court held that the unsecured creditor had no such superior equity over the occupants of the homestead and the purchaser C., that he could compel a marshaling of the assets on the death of the husband.

In Illinois it was held, in *Brown v. Cozard*, 68 Ill. 180, that

---

April Term, 1882.

---

"when a mortgagee, not by his own voluntary action and for his own benefit, but at the instance and for the benefit of a judgment creditor for the purpose of having his judgment satisfied, is compelled to resort first, for the satisfaction of his mortgage, to the tract subject to the homestead exemption, as respects the judgment, the mortgagor would then seem to have just cause for complaint that his homestead had been taken away from him in a mode not contemplated by the statute, and whereto he had never given his consent."

In Minnesota, in *McArthur v. Martin*, 23 Minn. 80, it was said that "homestead exemptions are favored by the courts, and as the application of the rule contended for in reference to the marshaling of assets, would be but an indirect method of subjecting the homestead to the payment of debts, a court of equity would not permit it to be applied in favor of judgment creditors in this case."

In Alabama, in *Ray v. Adams*, 45 Ala. 168, it was held that "the right of the debtor to his exemption, though inferior to that of his mortgagees, was superior to that of his judgment creditors. The prior mortgage did not enlarge his rights." In *Ray v. Adams*, there had been a sale under the judgment, and the debtor having been put to his election, had chosen what was set off as a homestead, and the balance of the real estate was sold. Upon a cross-bill by the judgment creditor and purchaser to compel the mortgagee first to exhaust the homestead, for their benefit, the court refused to give the relief sought.

A contrary doctrine was distinctly laid down in *White v. Polleys*, 20 Wis. 530, in which the court applied the general rule of equity that where one person has only one fund to which he can resort, and another person has two funds, the latter will be compelled to resort to that fund which will leave the means of payment for the person who has only one fund out of which he can be paid. Subsequently to the rendering of this decree a statute was passed in Wisconsin, "the object of which was to repeal the rule laid down in *White v. Polleys* and other cases." *Thomp. Homest. and Exempt.*, § 660. The cases on this subject will be found well collected in the valuable book last quoted.

The weight of authority, I think, is against the ruling of the

---

Dissenting Opinion.

---

Circuit judge, and leans to the opinion that while a mortgagee may have the right to select to sell the homestead first, and the surplus afterwards, if necessary, or *vice versa*, as to him may seem best, other creditors have no right to compel their choice one way or the other. I have already shown that the Court of Equity has never, as in the case of charities, applied the doctrine of marshaling, so as to bring about indirectly a payment out of a fund which cannot, by law, be made out of it directly on account of some positive prohibition.

The provisions in the constitution of 1868 in favor of the homestead, reserved it from attachment, levy or sale under mesne and final process to the head of the family, and the acts of the General Assembly in pursuance of the constitution to enforce the same are remedial in their nature, intended to establish a great public policy, and in doubtful cases it is the duty of the court in every fair and legitimate way to extend the remedy. In this State a mortgage is nothing more than a security for the payment of money, and cannot be extended beyond the contract of the parties. It is no part of the contract in an ordinary mortgage that the property shall be liable to the claims of creditors not contemplated in its terms, and it is difficult to see how any rule of equity for marshaling assets can be allowed to work a benefit in favor of creditors which the head of the family cannot create, by "any waiver, however solemn." It is not necessary to say judgment creditors, because all creditors can put their claims into judgments, and if judgment creditors have any rights, then all creditors may sooner or later obtain them.

The judgment creditor, under the constitution and the acts of the General Assembly, has no right to sell the homestead under his judgment in the usual way, and is even forbidden to do so under heavy penalties against the officer executing the process, and the court, I think, has no right to extend the terms of the mortgage, so as to enable creditors not contemplated in it to obtain indirectly an advantage which they could not do directly, because of a positive prohibition of the statute.

Judgment affirmed.

---

April Term, 1882.

---

## NOBLE v. COTHMAN.

1. A sheriff cannot refuse to enforce an execution in his office for a balance due by sureties, although after such judgment a former judgment for a less sum against the principal debtor on the same debt had been satisfied.
2. An unsatisfied judgment against the principal debtor cannot be pleaded in bar of an action on the same debt against the sureties; and judgment may be had against the sureties for the sum then due upon the note sued on.
3. Judgment obtained against a principal debtor on a note bearing twelve per cent. interest (a judgment bearing only seven per cent.) was paid after a subsequent judgment had been entered against the sureties for a greater sum, resulting from the difference in interest; execution was then issued against the sureties for such difference as an unpaid balance. *Held*, that the execution against the sureties was not satisfied, and that they were liable for its payment.

Before FRASER, J., Abbeville, November, 1881.

The opinion states the case.

*Mr. Armistead Burt*, for appellant.

*Mr. E. Noble*, contra.

April 24th, 1883. The opinion of the court was delivered by MR. JUSTICE MCGOWAN. This was a rule upon the sheriff, Du Pre, for not collecting and paying over a balance alleged to be due the plaintiff on the execution issued in the case of *Andrew A. Noble, Executor, v. James S. Cothran and William H. Parker*.

It appeared that April 30th, 1872, Miller & Robertson, with the defendants, Cothran and Parker, as sureties, executed a note for \$600 to William P. Noble. The terms of the note were "we, or either of us, promise to pay;" and the interest at twelve per cent. per annum was made "payable annually." The plaintiff, as executor of the payee, sued the principal debtors, Miller & Robertson, and on May 19th, 1876, obtained judgment against them for the sum of \$785.69, counting the interest at twelve per cent. up to the time of the rendition of the judgment, which, of



---

Opinion of the Court.

---

course, afterwards bore interest only at the legal rate of seven per cent. per annum.

The executor also sued in a separate action the defendants, sureties, who, upon some ground, filed a demurrer, which was overruled, and, on February 17th, 1879, judgment was rendered against them for \$938.45, the difference in the amount of the judgment and that rendered against the principal debtors, arising from the addition of the interest at twelve per cent. which had accumulated against the sureties in the meantime. Execution was issued on this judgment January 26th, 1881, not for the whole amount recovered, but for the sum of \$238.22, balance.

Before the last judgment was obtained against the sureties, an amount sufficient to satisfy the judgment against the principal debtors, and costs, had been paid to plaintiff's attorney, except a balance of \$146.70, which was tendered by the sheriff to the plaintiff's attorney on January 22d, 1881, after the judgment had been obtained against the sureties, February 17th, 1879, but before the execution was lodged against them, January 26th, 1881. The plaintiff refused to receive the balance due on the execution in the first case against the principals, in which, after judgment, the interest was running at seven per cent., and ruled the sheriff, Du Pre, for not collecting and paying over to him the whole amount of the execution issued upon the second judgment against the sureties, viz., the sum of \$238.22, which was larger than the judgment against the principal debtors, by the additional five per cent. interest which was calculated on the note against the sureties, during the period intervening between the first judgment against the principals and the second against the sureties.

The sheriff in his return stated the facts as above given and concluded as follows: "The respondent has been advised, and has in good faith acted upon the advice, that as the judgment against Miller & Robertson and that against Cothran and Parker were upon the same note, in which the former were principals and the latter were sureties; the payment of the judgment against the principals was satisfaction of the judgment against Cothran and Parker, the sureties to the same debt, and that he,

---

April Term, 1882.

---

consequently, could not levy the property of the latter for a debt which has been paid."

The return came up before Judge Fraser, who held that the late case of *Hellams v. Abercrombie*, 15 S. C. 110, covered the point, and was conclusive against the defendants. He ordered that the rule against the sheriff should be made absolute, and from this order the defendants appeal to this court upon the following grounds: "1. Because a creditor cannot recover or collect from a surety a greater sum than he can from the principal debtor. 2. Because the payment and satisfaction of the judgment against Miller & Robertson, the principal debtors, was an extinguishment of the several judgment against J. S. Cothran and W. H. Parker, their sureties. 3. Because payment or satisfaction of the debt of the principal debtor, is the performance and satisfaction of the contract of the surety and his discharge from all liability for his promise. 4. Because the relation of a surety to his principal is the same after judgment as before, and his liability is only secondary, and it was error in the presiding judge to hold that the liability of the sureties was not ended as soon as the debt of their principals was paid and satisfied and they discharged from their liability to the creditor."

The exceptions seem to charge error in the order of the Circuit judge making the rule absolute against the sheriff, upon two grounds, which, for the sake of clearness, we will consider separately. They allege first that a creditor cannot legally recover a larger sum against a surety than he has recovered against the principal on the same debt—that as a rule the liability of the surety is measured by that of the principal; and, second, that even after a larger sum has gone into judgment against the sureties, the creditor cannot collect anything on the judgment against the sureties, in excess of what would pay and discharge the judgment for a less sum against the principal.

In reference to the first branch of the inquiry, as to whether a larger sum may be recovered against the surety than was recovered against the principal debtors, it might in this case be enough to say that the proper time to make that question was when the second judgment was recovered against the sureties; and that after such judgment had been recovered and the lodg-

## Opinion of the Court.

ment of an execution thereon, it was not for the sheriff, a ministerial officer, to suggest that he ought not to be required to enforce the process in his hands for the reason that the recovery was erroneous. But as this question was not raised in the case, we will consider whether the rendition of the second judgment for an amount larger than the first judgment, was error. It seems that the surety defendants did not make the question at the trial. They demurred upon some ground which does not appear, and the demurrer being overruled, there was judgment by default, February 17th, 1879, and the assessment at twelve per cent. was made on the note up to that time and entered into the judgment, which made it to that extent larger than the judgment which had been previously rendered against the principal debtors.

Suppose the sureties had then made the defense that judgment had previously been rendered against the principal debtors for a less sum, could it have been sustained? Although the defendants, Cothran and Parker, were only sureties on the note so far as their principal debtors were concerned, their obligation was in terms "we, or either of us, promise to pay," and in regard to the creditor they were original obligors as well as the principal debtors, and might have been sued alone independent of any action against them, and if they had been so sued, can there be any doubt that the interest on the note at twelve per cent. per annum would have been calculated and added in the judgment? Probably, as springing out of this direct relation of the sureties as debtors of the creditor, it seems to have been settled in this State long before the case of *Hellams v. Abercrombie*, 15 S. C. 110, that a former judgment against the principal debtor, still remaining unsatisfied, could not be pleaded in bar of a subsequent action on the same note against the sureties. *Treasurers v. Bates*, 2 Bail. 362; *McDonald v. Pickett*, Id. 618; *Peters v. Barnhill*, 1 Hill 234; *Stinson v. Brennan*, *Cheves* 16.

In the case of *McDonald v. Pickett*, *supra*, it was held that to "an action on a promissory note brought against the surety in the name of the original payee, it is no defense that the latter had obtained judgment on the same note against the principal." In delivering the judgment of the court, Judge O'Neill said:

---

April Term, 1882.

---

"The force of the objection can be tested by a single question, Can the former recovery by the plaintiffs against the principal, Beckham, be pleaded in bar to a recovery in this case without averring satisfaction of it? It is clear that it cannot; and it is equally clear, from the facts already stated, that the judgment is not satisfied." So we may say here, at the time the judgment was rendered against the sureties, the first judgment against the principal debtors was not paid in full. If it had been, it might have been pleaded in bar. It is true that the balance on that case was tendered on January 22d, 1881, before execution was entered, but after the judgment was rendered on the same debt. But that tender of payment could not operate retrospectively and affect the judgment which had already been rendered, and it was necessary for the execution to issue in conformity to the judgment rendered.

But, accepting this view, it is still further insisted that, although the first judgment was not paid until after the second judgment was rendered, the sureties have since paid enough to satisfy the first judgment, principal, interest and costs, and that should operate as satisfaction of the first judgment, and the sheriff should not be required to collect so much of the execution against the sureties as is in excess of the first judgment, arising from the note running for a longer time against them at twelve per cent. interest. Without undertaking now to consider the rights which may exist between the sureties and the principal debtors, but looking to their rights in reference to their creditor and his two judgments, one against the principal and the other against the sureties, we know of no principle which would authorize the court to declare the larger judgment against the sureties satisfied, simply upon it being shown that both judgments were on the same note, and that the first against the principal debtors had been paid in full, principal, interest and costs. One judgment is certainly satisfaction of the other, but only *pro tanto*. *Day v. Hill*, 2 *Spears* 629; *Jones v. Kilgore*, 2 *Rich. Eq.* 63; *Lumpkin v. Ferguson*, 10 *Rich.* 424.

In the case of *Jones v. Kilgore*, it was distinctly held that "where judgments on the same cause of action are identical in amount, satisfaction of one is satisfaction of all. Where, how-

## Syllabus.

ever, they are not for the same amount, satisfaction of the one for the smaller sum is only satisfaction *pro tanto* of the others;" or, in the language of Judge Munro, in *Lumpkin v. Ferguson, supra*, "That the plaintiff is entitled to but one satisfaction of several judgments rendered against the parties, both having been rendered for the same debt, does not admit of a doubt, upon the well recognized principle, that where there are distinct judgments against different defendants for the same debt, all are extinguished, except as to costs, by the satisfaction of any one of them, without regard to the ultimate liabilities of the defendants to each other. *Davis v. Barclay*, 1 *Bailey* 140; *Noonan v. Gray, Id.* 437. But it is manifest that the rule can only apply where all the judgments are founded on the same cause of action, and are identical in amount, for, were the rule otherwise, the most flagrant injustice would often result from its operation," &c.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## POPE v. MATHEWS.

1. A testator directed his executor to invest the proceeds of certain sales, and his cash and choses in action "in bank stock or otherwise." At his death, testator held note of long standing against A., one against B. with A. as surety, and another against C. The executor permitted A. to renew his own note, and also with his own note to take up the notes of B. and C., neither of these new notes of A. having any surety or other security. The executor lent other of this fund to D. in April, 1860, under D.'s promise to furnish good security, which was never done. A. and D. were perfect by solvent when their notes were taken, but after the war were insolvent, and the fund was lost in part to the estate. *Held*, that the executor was not liable for the losses on these notes. MR. JUSTICE McIVER, *dissenting*, except as to the renewal of A.'s individual note.
2. *Nance v. Nance*, 1 *S. C.* 218, modified. MR. JUSTICE ALDRICH, *dissenting*.

Before KERSHAW, J., Newberry, November, 1880.

This was a bill in equity filed in 1867, by Francis M. Pope, V. J. Tobias and Josephine M., his wife, against Bird C. Mathews, as executor of the will of Jacob Pope, deceased.

---

April Term, 1882.

---

Jacob Pope died in August, 1849, leaving of force a will, whereby he gave his entire estate to his wife for life, and certain personalty absolutely. The last two clauses were as follows :

4. I give all the rest, residue and remainder of my estate to my grandson, Jacob Pope Rutherford, in fee-simple, after the death of my wife ; and I direct my executors to take charge of the property and manage the same for his benefit until he shall attain the age of twenty-one years, selling such portions of the property as they shall see fit (excepting the land and negroes, which are not to be sold), and to invest the proceeds of the sale, and the cash and choses in action, in bank stock or otherwise.

5. I nominate and appoint Thomas H. Pope and Bud C. Matthews executors of this, my last will and testament.

There was a codicil to this will in the words following :

"If my grandson, Jacob Pope Rutherford, should die without leaving issue then living, all the property and estate given to him by my said will shall go to the children then living, of my son, Mark F. Pope, deceased, to be equally divided among them ; but neither of the children of my said son shall receive his or her share until he or she shall attain the age of twenty-five years. This codicil is to go into effective operation if my said grandson, Jacob Pope Rutherford, shall die without leaving issue then living, whether it shall so happen in my life-time or after my death, and at whatever age he may so die without leaving issue then living."

The defendant, Bud C. Mathews, alone qualified as executor. The widow of testator died in 1858, and Jacob Pope Rutherford, without issue, in 1859. The children of Mark F. Pope, living at the death of Rutherford in 1859, were the present plaintiffs, F. M. Pope and V. J. Tobias, who respectively attained the age of twenty-five years in 1865 and 1867.

Many of the issues in this cause were settled by the referee and the Circuit judge. The questions brought to this court were based upon the following facts: At the time of his death, testator held a note on John Belton O'Neill, who was then a judge of our Law Courts, and afterwards Chief Justice of the Appeal Court. This note, dated September 15th, 1840, was for \$688.76, and was unsecured. It was renewed to the executor December 31st, 1853, for \$1,329.54, without any security. There was another note against George Pope and Judge O'Neill, dated in 1839 or 1840, for \$3,594.30, with credits. George

---

Circuit Decree.

---

Pope died soon after testator, and Judge O'Neill was his executor. In September, 1855, Mathews, executor, allowed Judge O'Neill to give his own unsecured note for \$4,275.57, and thereby to take up the George Pope note, including, says the executor in his testimony, "a debt of \$1,000, which Thomas H. Pope took out of Jacob Pope's estate and used."

In April, 1860, Mathews let one Ramage have \$600 of the estate money, under Ramage's promise to furnish security to the note then given, which, however, was never done. Mathews testified that Ramage was to "give security, but war came on and he did not." Ramage testified to the same effect.

It was fully proved by the testimony of many witnesses that before the war Judge O'Neill was a man of large estate, and that both he and Ramage were abundantly solvent and in good credit; that it was not customary for solvent men to secure their notes by mortgage, and that to ask a solvent man for a mortgage was considered an insult. Both Judge O'Neill's estate and Ramage were insolvent after the war. From the former nothing was collected during his life-time (he died during the war), and only a small amount since; from the latter, nothing has been received, and it is doubtful whether any amount can be collected.

The plaintiffs claim that the defendant is liable for these three notes, with interest from the death of Jacob Pope Rutherford. The referee so reported, and ordered the defendant to pay the costs of the action. Upon exceptions to this report, the cause came on to be heard before Judge Kershaw, who filed the following decree:

This case was heard upon exceptions to the report of J. F. J. Caldwell, Esq., referee.

The first question I will consider is, whether the executor is accountable for the loss which has ensued in consequence of the insolvency of the O'Neill notes, and his failure to collect them when they were collectible.

I do not regard the case as the same with that of a trustee, who, having funds in his hands to invest, puts them out upon personal securities without surety or collateral. These notes were never collected by the executor. They were simply renewed; the

---

April Term, 1882.

---

debt remained the same. It is true the note of Judge O'Neill alone was taken as a renewal of the joint and several notes of Pope and himself, but there is nothing in the case to show that the renewal note was not as good as the original. If the executor is to be held liable at all, it must be for not having called in the debt in order to re-invest it, "in bank stock or otherwise," as prescribed by the will. If he had done so, and invested in "bank stock" (the security which seemed to be preferred by the testator, and therefore to be preferred by the executor), it would have been wholly lost to the estate, and in that aspect of what might have been, it was best for the *cestuis que trust* that that course was not pursued. But if the trustee had any discretion to invest otherwise than in bank stock, why should he not leave the money where it was, in the hands of a man of great wealth and spotless integrity? Where would he have found a better investment, or one more likely to prove good under all circumstances? It remained perfectly good until the conquest of the State by the Northern armies and the destruction of property and values consequent thereupon.

If anything has been lost to the plaintiffs, therefore, it is attributable, not to the omission or failure of the executor, but to the disasters of war. What justice or equity is to be promoted by holding a trustee liable under such circumstances? On the contrary, does it not shock the sense of natural justice to hold one thus liable? If, however, the principles of equity as administered in this State from motives of general policy, require this sacrifice of natural equity, then, however subversive of our sense of right, the executor here must be made the victim.

England, the country from which we derive our laws and system of jurisprudence, has never passed through a crisis like that which destroyed this State and swept away nearly all securities, public and private, and the enlightened judges of that noble commonwealth were therefore never called upon to consider how far such circumstances might modify the rules regarding the liability of trustees, laid down by them for an ordinary and normal condition of affairs. In this State, how-



---

Circuit Decree.

---

ever, we have precedents almost identical, arising out of the destruction of values here during the Revolutionary war.

[The learned judge here cites and considers the following cases: *Morton v. Smith*, 1 *Desaus.* 123; *Webb v. Bellinger*, 2 *Id.* 508; *Thompson v. Wagner*, 3 *Id.* 103; *Stukes v. Collins*, 4 *Id.* 207; *Edmonds v. Orenshaw*, *Harp. Eq.* 224; *Doud v. Sanders*, *Id.* 277; *Massey v. Cureton*, *Chew Eq.* 187; *West v. Clark*, 1 *Strobh. Eq.* 185; *Monk v. Pinckney*, 9 *Rich. Eq.* 293; *Martin v. Jefcoat*, 10 *Id.* 118; *Taveau v. Ball*, 1 *McCord Ch.* 464; *Bryan v. Mulligan*, 2 *Hill Ch.* 364; *Glover v. Glover*, *McMull. Eq.* 154; *Hext v. Porcher*, 1 *Strobh. Eq.* 171; *Boggs v. Adger*, 4 *Rich. Eq.* 410.] •

These cases were decided before or during the continuance in office of this executor. If he consulted the law for his guidance, these are the cases to which he was referred by his counsel. He found in them all the same enlightened, reasonable and humane principles which pervaded the old case of *Morton v. Smith*. He found that he was only required to act with the same care, circumspection and diligence which a prudent man would exercise under the same circumstances, honestly and "for the best." That if he did not violate any of the provisions of the law, or of the will of the testator, and fairly and honestly performed his duty, as he deemed best for the estate, he would not be answerable for consequences which he could not foresee or provide against.

It may be supposed that the view here presented is not the proper one; that the renewing of these notes was, in effect, the same as a collection of the money and its re-investment in the new notes; that this was a violation of duty on the part of the executor, inasmuch as he was directed by the will to invest in "bank stock or otherwise." An investment in bank stock would not, perhaps, have yielded as much profit to the estate as did these notes; for, since the war, the executor has realized on them a considerable sum of money, whereas the bank stock would, at most, certainly have been a total loss.

---

April Term, 1882.

---

But, although bank stocks appear to have been preferred by the testator, the direction was not positive to invest in them. But a discretion was allowed the executor to invest either in bank stock "or otherwise." What, then, was the alternative presented by this word "otherwise"?

In England it would have been held to imply an investment in such securities as the court would approve, to wit, consols. But here we had at that time no rule prescribing what kind of investment should be made by executors or trustees. This is admitted by the late Chief Justice, in *Nance v. Nance* (1 S. C. 218). "In this State," says he, "while the principles of equity from which the English rule was deduced are recognized and enforced, the rule itself has undergone modification to suit the circumstances of the country. No case is found localizing the English rules on the subject of personal securities in this State." The nearest approach to it is in *Spear v. Spear*, 9 Rich. Eq. 184, where a guardian, engaged in trade, had employed the funds of his ward in the hazards of mercantile enterprise. The court was "of opinion that the guardian should change, as soon as practicable, the investment of the funds of his ward into public securities, or bonds secured by a lien on real estate, or, at least, bonds of third persons with proper securities."

But this laid down no rule for other cases. Executors were left to their discretion as to the character of their investments, subject only to the rule found in all our cases, that they should use proper diligence, and act in good faith and "for the best." There was good reason for not laying down any arbitrary rules of that sort. Public securities were here very few, and little known to our people. They were a rural population, engaged almost wholly in agriculture, and the great bulk of their wealth was invested in slaves. No investments were so much sought after, and few were so readily available as those based upon property of this character. Our people were often characterized by a very high sense of honor in regard to the obligations of debtors, as may be seen from the evidence in this case. Some of the witnesses state that it would have been regarded as an insult to ask of a debtor the security of a mortgage on lands,

## Circuit Decree.

and that such securities were very unusual. The fact is, that the note of a man of large estate in land and slaves, a man of position and high character, and not embarrassed with debt—such a man as Judge O'Neill appears from the testimony to have been—was based upon the security of the lands and negroes which he owned, and there is little doubt that, if this executor had applied to the Court at that time, to sanction his transactions with that distinguished gentleman, he would readily have obtained it.

Be this as it may, there was no arbitrary rule by which he was bound, and hence, when the executor was left to his discretion, to invest in bank stock "or otherwise," he was at liberty to invest in personal securities which were undoubtedly good at the time, and likely to remain so, and did remain so until destroyed by war. But the referee (to whose learning and industry I am much indebted in this case), says that he is unable to find any case where the executor was exonerated where he failed to take security on a note. On the other hand, we have not been referred to any case in this State, where an executor has been held liable for such a failure, before that of *Nance v. Nance*. It is not here intended to impugn the authority of the case of *Nance v. Nance*, but it certainly did lay down a rule which, however right and proper in the present condition of our affairs, had never before been recognized in this State. To hold this executor bound by the law, as pronounced in that case, would be to violate the principles laid down in all the cases which preceded it, as understood and applied by our most eminent judges.

This, however, is not the case of a trustee, who, having funds in his hands which it is his duty to invest, does invest them in securities not recognized as proper. I distinguish the case thus: This executor merely failed to call in these debts, leaving the money out on such securities and in the hands of such persons as testator himself had considered worthy of trust and confidence. In so far as he changed these securities, they were not materially altered; that he exercised a discretion allowed him by the will; that he acted in good faith, with proper prudence, and for the best; that the security remained perfectly

---

April Term, 1882.

---

good until affected by the war, which the executor could neither have foreseen nor provided against; and lastly, that any other investment which he might have made, and especially of the sort preferred by the testator, would in all probability have resulted in equal or greater loss to the estate.

The case of the Ramage note is not exactly the same. That was a loan of money of the estate by the executor, in 1860, upon a note without security. He did require security, and Ramage agreed to give it, but the war came on and it was not given. Ramage was in good credit, and solvent at the time, but was ruined by the war. In this case, the negligence imputed to the executor was, that he parted with the money before the surety signed the note. I do not think this sufficient to charge him. It was an unfinished transaction, and the question is whether, if, in the progress of a negotiation of this sort, an executor entrust a man in good circumstances and credit with the funds of the estate, upon an assurance that the contract will be completed, would he be guilty of such negligence as to charge him. If that were so, then he would be liable if he gave up a note or other security to a debtor in good credit, who gave him for it a check on the bank, which was not paid.

In Lord Hardwicke's time, it was held that "where a receiver pays money to a tradesman, and takes bills for the same, in order to remit to London, if he was in credit at the time, though he fail soon after, it shall not affect the receiver." *Knight v. Lord Plymouth*, 3 Atk. 480; *Dick*. 140.

There must be some trust somewhere, and the business of life could not get on without it. If Ramage was a man to be trusted in this way (and from the testimony it must be inferred that he was), I do not think the executor was guilty of such negligence as to charge him. Moreover, if the money had not been let out as it was, it would in some form have shared the general wreck of all things brought on by the war; and it is very difficult to say that the estate lost anything by the transaction.

The estate should pay the costs of this litigation. It was scarcely possible that the estate could have been settled without litigation, and the executor is not responsible for the condition

---

Opinion of the Court.

---

of the business. He was not responsible for the various delays attending the references.

The referee was the judge of the propriety of granting the continuances, and, having granted them without imposing terms at the time, they are not now to be imposed. Furthermore, no question is made of the fidelity and honesty of purpose of the executor. \* \* \*

It is ordered, adjudged and decreed, that the report be confirmed and made the judgment of this court, except as herein modified; that as to those points wherein the exceptions have been sustained, it be referred to the master to correct the said report and to modify the same, so as to make it conform to the principles of this decree.

From this decree the plaintiffs appealed, alleging error in discharging the executor from liability for the O'Neill and Ramage notes, and in requiring the costs to be paid out of the estate.

*Messrs. James Y. Culbreath and J. S. R. Thomson*, for appellants, cited the cases referred to in the Circuit decree and also the following: 1 S. C. 279, 458; 3 *Id.* 451; 4 *Id.* 366; 7 *Id.* 324; 8 *Id.* 244; 9 *Id.* 490; 14 *Rich. Eq.* 300.

*Messrs. L. J. Jones, G. S. Mower and Ernest Gary*, contra.

June 29th, 1883. The opinion of the court was delivered by

MR. JUSTICE ALDRICH. In *Witherspoon and Wife v. Watts et al., Ex'rs*, I stated why I have been delayed in filing the opinion assigned me in that case, which also applies to this. *Ante p.* 396.

This is an appeal from the decree of his Honor, Judge Kershaw, which is so full and convincing, so well sustained by reason and authority, that it is hardly necessary to enlarge on what he has so strongly enforced. The decree collates the authorities on which the judgment of the court is based. The proposition is that a trustee is not liable if he discharges his trust with the same care and prudence that a prudent man will use in the transaction of his own affairs. As was said in *Doud*

---

April Term, 1882.

---

v. *Sanders*, *Harp. Eq.* 277, executors "are always protected by the court when they have acted conscientiously and for the best." Also in *Glover v. Glover*, *McMull. Eq.* 154, "When an executor acts upon a rule established by the habits of society, and in some degree from necessity, it ought not to be imputed to him for negligence." And so, in *Hext v. Porcher*, 1 *Strobh. Eq.* 171, "A trustee here is required to act faithfully in the interests committed to him, but the general management is left to his discretion."

This court has not the slightest inclination to interfere with the rule laid down in *Nance v. Nance*, 1 *S. C.* 218. But the question now presented is, Does the rule apply to a transaction completed before that case was decided? The testator, Jacob Pope, by his will, made Bud C. Mathews, his brother-in-law and trusted friend, his executor. In the will he gave the executor power to sell a portion of the estate, "and to invest the proceeds of the sale and the cash and choses in action, in bank stock or otherwise." He died in 1849. Among the assets were two notes, one of the late Chief Justice O'Neill and of Pope and O'Neill, the latter being the surety of Pope. Pope died, and O'Neill was appointed his administrator. There was also a note of Ramage. The executors allowed O'Neill to renew his notes, but took no sureties. He also permitted Ramage to renew his note, but required him to give security. Ramage failed to add a surety to his note; the war coming on it seems to have been overlooked in the excitement.

The special objects of the testator's bounty were his widow and his grandson, Rutherford, the sister and nephew of the executor. These plaintiffs only take an interest in the estate of the testator in case of the death of these special objects of his love. The widow, after the payment of some legacies, was to receive the whole estate for life—Rutherford, after her death, when he arrived at the age of twenty-one years. The plaintiffs, in case of the death of Rutherford, without leaving issue then living, to take the estate when they arrived at the age of twenty-five years, which would be in 1865 and 1867.

The referee, Mr. Caldwell, in his report, charged the executor with the notes of O'Neill and Ramage. The case was heard on

---

Opinion of the Court.

---

exceptions to that report. Judge Kershaw, in a very carefully considered decree, overruled the referee, and decided that the executor is not liable. The question submitted by the appeal is to reverse this decision.

As I have said, the rule in *Nance v. Nance* is approved, but is it just and equitable to apply that rule to this case? It has always been the law in this State, "that the trustee is answerable for those losses only which are occasioned by such acts or omissions as a prudent man could not do or omit in his own affairs." So it is said in *Nance v. Nance*, "The rule as laid down was intended to define the responsibility of trustees while acting within the limits of their discretion, and not to give support to the ideas that the discretion was unlimited as to the character of investments, and their responsibility measured solely by the purity of their motives and the degree of care exercised in the control of the trust fund."

It appears, from the evidence, that the O'Neill and Ramage notes were perfectly good up to the close of the war; that the executor was advised by the judge not to put money in bank stock, but to put it out at interest in notes on individuals. The referee, in his report, says: "The parties executing the notes appear to have been good at the time, and it is not the executor's fault that they are not so now. He has kept the funds separate from his; he has been diligent; he appears to have been perfectly honest; and he thus seems to have acted with that fidelity and sagacity which the great current of decisions in this State pronounce sufficient for a fiduciary's exoneration." He absolves him from all liability for funds and property held by him before and during the war, except the O'Neill and Ramage notes.

At first, I was disposed to think the learned judge was in error; but after carefully considering his decree and reviewing the authorities he has adduced in support of it, I have come to the deliberate conclusion, that it will not only be a hard case to charge this executor with the O'Neill notes, but that it will violate every principle of equity by which this court has heretofore been governed. Undoubtedly, up to the close of the war, the note of Judge O'Neill was a perfectly safe investment; not a shadow of suspicion could be cast on his paper; in addition to

---

April Term, 1882.

---

his exalted character and large estate, it was not the custom of the community to require mortgages, and it was common to lend money to solvent men without taking a surety. If we add to this the fact that the testator himself had invested in Judge O'Neill's paper, without additional security, how can it be said that this trustee did not act as a prudent man would with his own, especially, too, when he was acting under the counsel and advice of one of the highest legal authorities in the land? That he did not collect the note, is not worthy of consideration. Why collect money, directed to be invested, to lend it out again immediately? Why call in what was then considered as good an investment as the country afforded, to re-invest it in another note, not better, if so good?

The Ramage note is somewhat on a different footing. As regards this investment, the executor did require a surety; but he let Ramage have the money before the surety was given, thus showing that he was entirely satisfied that the note with only Ramage's signature was perfectly good, in which judgment he is fully sustained by all the evidence. The excitement and confusion of the war prevented the completion of the arrangement. It may be said, that he did require a surety showed he was not satisfied with the safety of the investment; but this idea is negatived from the fact that he let Ramage have the money without the surety, and by the abundant testimony as to his solvency and ability to meet his engagements at any time before the disaster of defeat. In addition, the learned judge who heard the cause, was satisfied the executor acted as a prudent man would in the management of his own affairs. I think so, too, for it is more than probable that any surety Ramage may have offered would not have been better than himself, and would, like him, at the close of the war, been broken up and ruined. Would it be equity to say now, because the executor, in the exercise of his discretion, or, if you will, by accident, and occasioned by the confusion and excitement of the war, did not do that which, at first, he intended to do, and which, if he had done, would not have made the fund any more secure, or benefited the estate, shall now be liable for an investment that, under any circumstances, would be worthless? I think not. Besides, this is a question



---

Separate Opinion.

---

of fact which the Circuit judge, after full hearing and careful deliberation, has decided in favor of the executor; and as no principle of law has been violated, and the will committed the general management of the estate to his discretion, this court will not depart from its practice and overrule the decree on a question of fact, supported by the evidence.

Costs follow the judgment, and there is no error here. The appeal is dismissed.

MR. JUSTICE McIVER. As I am unable to concur in all of the conclusions reached by his Honor, Judge Aldrich, to whom was assigned the duty of preparing the leading opinion in this case, I propose to state, as briefly as practicable, my views of the questions involved. [Here follows a statement of the case.]

These notes, so far as the question of the liability of the executor for the amounts thereof is concerned, seem to me to stand upon different grounds. The individual note of Judge O'Neill, given for the amount of his own note to the testator, is manifestly nothing but a renewal of a note in which the testator had seen fit to allow a portion of his funds to remain invested for a considerable length of time before his death, and as the executor was charged with the duty of investing the funds of the estate until the period arrived for turning it over to the parties entitled under the will, I am unable to see any breach of trust on the part of the executor in allowing this amount of the fund to remain in the same way in which the testator had for a long period kept it invested. I agree, therefore, that the executor is not chargeable with the amount of this note.

The other note of Judge O'Neill stands upon a different footing. There is no distinct finding of fact as to what was the intention of the parties in the transaction out of which this note arose; whether the note of Judge O'Neill was taken in satisfaction or payment of the note of George Pope, and the debt of Thomas H. Pope, or whether it was taken as a simple renewal of those debts. The referee, in speaking of the transaction, says that the defendant "allowed Judge O'Neill to take up this note with his own note, for the sum then due," &c., while the Circuit judge, in speaking of the O'Neill notes, uses this lan-

---

April Term, 1882.

---

guage: "These notes were never collected by the executor. They were simply renewed; the debt remained the same. It is true the note of Judge O'Neill alone was taken as a renewal of the joint and several notes of Pope and himself, but there is nothing in the case to show that the renewal note was not as good as the original."

The most natural inference is that the object of the transaction was, as the referee says, "to take up" or extinguish the original note, thereby releasing the estate of George Pope from any further liability thereon, so as to enable his executor to proceed with the settlement of his estate; and when to this is added the undisputed fact that to the amount of that note was added another debt due by another person—the sum of \$1,000 due the estate of Jacob Pope by Thomas H. Pope, with which Geo. Pope does not seem to have had any connection—the inference seems irresistible that the object was, not simply to renew the original note, but to extinguish the debt secured thereby, as well as the independent indebtedness of Thomas H. Pope, which, for some reason not disclosed in the testimony, Judge O'Neill was willing to assume, and create a new debt on the part of Judge O'Neill to the executor.

If this be so, then the practical effect of the transaction was that the defendant, as executor of Jacob Pope, collected both of these debts, as well the one due by Thomas H. Pope as the one due by George Pope, and re-invested the amount thereof in the individual note of Judge O'Neill, without any security of any kind. The legal question presented then, is whether an executor charged with the duty of investing the funds of his testator's estate, as this executor was, is at liberty to invest such funds in the note of a private individual without security of any kind. I am not aware of any case in which such an investment of trust funds has ever received the sanction of any court, and, on the contrary, there are at least two cases in which such an investment has been condemned. *Spear v. Spear*, 9 *Rich. Eq.* 184; *Nance v. Nance*, 1 *S. C.* 209.

In citing the last-mentioned case, I desire to say that while I have no fault to find with the judgment of the Court in that case, I have never been able to approve that portion of the

---

Separate Opinion.

---

opinion which undertakes to prescribe the limits within which a trustee is at liberty to exercise his discretion. It does not seem to me that the authorities in this State warrant the use of the following language in the opinion, where, in speaking of the character of the securities in which a trustee may properly invest trust funds, it is said: "Such securities should primarily consist of mortgages of unencumbered real estate, of a value sufficient to guaranty the debt against all contingencies liable to occur or capable of being foreseen. Bonds of individuals should not be taken in lieu of real securities unless unobjectionable investments cannot, in the exercise of reasonable diligence, be procured. When personal securities are taken in lieu of real, it will devolve upon the trustee to make the necessity and propriety of such investments appear, upon an accounting with the *cestui que trust*."

On the contrary, my understanding of the matter is that we have no rule here prescribing the classes of securities in which trust funds shall be invested, or the preference which is to be given to one class over another; but all that is required is that a trustee shall invest the funds committed to his care upon good and sufficient security. This is the limit of his discretion, and if, within this limit, he manages the funds entrusted to him with the same care and diligence that a prudent and cautious man bestows upon his own affairs, he will not be liable, even though loss may ensue. But where a trustee goes beyond this limit and invests trust funds without any security at all, he cannot escape liability for any loss that may ensue, even though he may be able to show that he has acted in good faith; for, by failing to take security, he substitutes himself as such, and must account accordingly.

It seems to me, therefore, that the executor is chargeable with the larger note of Judge O'Neill, given to take up the note of George Pope, as well as for the \$1,000 due by Thomas H. Pope. But, as I understand that the executor has already been charged with such amounts as he has received on this note since the termination of the war, from the assets of Judge O'Neill's estate, the amounts so received should either be stricken from the account already taken, or be allowed as credits to the executor

---

April Term, 1882.

---

on the amount of this note, so as to avoid charging the executor twice with the same.

For a similar reason, it seems to me that the executor should be charged with the Ramage note. This was a clear investment of trust funds, without any security whatever, and the fact that the executor intended to take security and failed to do so, only makes the case stronger against him. The excuse suggested for such failure, that the war came on, and, in the excitement and confusion incident to the times, it was overlooked, does not appear to me to be a sufficient reason for such neglect. The note bears date April 6th, 1860, more than eight months before the State seceded, and more than twelve months before hostilities actually commenced. There was, therefore, ample time before these stirring events occurred, for the executor to have arranged this matter, even if he could be excused for letting out trust funds without taking security at the time. It seems to me that the investment of trust funds stands upon a very different footing from accepting payment of a debt in a check upon a bank which proves to be worthless. A trustee might well be excused for doing the latter, as that would be in accordance with the usual course of business, but I do not think it a usual or proper practice for a lender to advance the money to a borrower before the required security has been given.

The question of costs is a matter peculiarly within the discretion of the Circuit Court, and in my opinion the Circuit judge, under all the circumstances of this case, wisely and properly exercised his discretion in requiring the costs to be paid out of the estate.

I think, therefore, that the judgment of the Circuit Court should be modified in accordance with the views herein announced, and that the case should be remanded to that court for such further proceedings as may be necessary to carry out these views.

MR. CHIEF JUSTICE SIMPSON. There being no testimony in this case showing either bad faith or negligence on the part of the trustee, on the contrary it appearing that the loss complained of occurred from causes which could not have been foreseen by

---

Statement of the Case.

---

him, I think under the circumstances he should be held harmless, especially as under the terms of the will he was invested with large discretion in the management of the estate entrusted to his care. I do not agree, however, with the remarks of Judge Aldrich, in reference to the case of *Nance v. Nance*. On this subject I concur with Judge McIver in the dissenting opinion, but this does not affect the result. I therefore concur in the general results herein.\*

Judgment affirmed.

---

STATE, EX REL. ANDERSON, v. SIMS.

1. *Query*. Can the board of State canvassers be required by *mandamus* to declare an election?
2. No clerk of court could be lawfully elected on November 7th, 1882, as there was no authority for such an election on that day. The statute (*Gen. Stat.* 1882, § 160,) authorized an election for clerk of court only at every alternate general election, reckoning from the year 1880; and if the clerk be a State officer, as has been held, then the constitution required the election to be had at every alternate general election, beginning with the year 1868. *Const., Art. XIV., § 10.*†

---

This was an original application to this court made in behalf of Julius H. Anderson, the relator, for a writ of *mandamus* to compel R. M. Sims, the secretary of State, and other members of the board of State canvassers, to declare the relator elected to the office of clerk of court for Horry county, in accordance with the returns in their possession made to them by the board of county canvassers for that county.

*Mr. F. W. McMaster*, for relator.

*Messrs. Youmans*, attorney-general, and *W. W. Sellers*, contra.

---

\* This completes the cases of April Term, 1882—REPORTER.

† See post, *Notes of Causes*, No. 1310.

---

November Term, 1882.

---

December 2d, 1882. The following order was passed :

PER CURIAM. On hearing the petition and return in the case above stated, it is ordered that the petition be dismissed for reasons which will be stated in an opinion hereafter to be filed.

January 27th, 1883. The opinion of the court was delivered by

MR. JUSTICE McIVER. This is an application to this court, in the exercise of its original jurisdiction, for a *mandamus* to compel the board of State canvassers "to ascertain from the managers' returns and statements forwarded to them by the board of county canvassers of Horry county, that Julius H. Anderson, at the general election held on the said seventh day of November instant, received the highest number of votes for the office of clerk of the court, in said county, and to declare the same and certify such declaration, and none other, to the secretary of State." The board of State canvassers made return, saying "that they declined to canvass any vote for clerk of the Court of Common Pleas for Horry county, at the general election for 1882, in consequence of section 160, of the Revised Statutes of this State. [Edit. 1882.]" That section reads as follows: "There shall be a general election for the election of the following county officers, to wit: judge of probate, county commissioners and school commissioner, held in each county at every general election for members of the house of representatives; and for the election of sheriff, coroner and clerk of the Court of Common Pleas, at every alternate general election, reckoning from the year one thousand eight hundred and eighty," so that the sole question made by the pleadings is, whether there was any legal authority for holding an election for clerk at the general election held on the seventh day of November, 1882.

Another question was suggested in the argument, and that is, whether the writ of *mandamus*, as prayed for, can be issued to the board of State canvassers. This depends upon the result of an inquiry, whether the duty sought to be enforced is such a ministerial duty as that its performance can be enforced by a writ of *mandamus*, or whether it is judicial. This, however, is a very important question, and inasmuch as it was not raised by

---

Opinion of the Court.

---

the pleadings, and was not fully argued at the bar, we prefer not to enter upon its consideration at this time. Waiving this question, therefore, for the present, and assuming, for the purposes of this case, that the performance of the duty demanded of the board may be enforced by *mandamus*, we will proceed to inquire whether the relator has stated such a case as would entitle him to the writ of *mandamus* as prayed for.

If there was no law providing for the holding of an election for the clerk of the Court of Common Pleas for Horry county on the day of the general election in 1882, then clearly there was no valid election for that office, and there was no obligation resting upon the board of State canvassers to declare the result of an election held without legal authority; and if they had done so their action would have been unauthorized and a mere nullity, and, of course, a writ of *mandamus* would not be issued to compel the performance of an unauthorized and illegal act. In the absence of any provision in the constitution designating the time for holding the election for clerk, the General Assembly could fix the time; and this they have undertaken to do by section 160 of the General Statutes of 1882 above quoted, to wit: "At every alternate general election, reckoning from the year one thousand eight hundred and eighty."

This necessarily fixes the day of the general election in 1884, and not the day for the general election in 1882, as the time for holding the election for clerk. In fact there is no act of the General Assembly, so far as we are informed, and none such has been cited to us, designating the day of the general election in 1882, as the day for holding an election for clerk in the county of Horry, and hence, in the absence of such an act, there was no more authority for holding an election for that office on the 7th day of November, 1882, than there would have been for holding an election on any other day that might have been suggested.

But, in addition to this, it appears to us that the constitution does fix a day for holding all such elections. Article II., section 11, as amended, is in the following language: "The first election for senators and representatives, under the provisions of this constitution, shall be held on the 14th, 15th and 16th days of April, of the present year [1868], and the second election

---

November Term, 1882.

---

shall be held on the third Wednesday in October, 1870; and forever thereafter on the first Tuesday following the first Monday in November, every second year, in such manner and in such place as the legislature may provide." And in article XIV., section 10, it is provided that: "The election for all State officers shall take place at the same time as is provided for that of members of the General Assembly, and the election for those officers whose terms of service are for four years, shall be held at the time of each alternate general election." If, therefore, the clerk of the Court of Common Pleas is a State officer, as has been held by this court in the case of *Williman v. Ostendorff*, MS. decision filed February 12th, 1877, then it follows that the election for clerk is required by the constitution to be held at each alternate general election, for he is one of the officers whose term of service is four years, (*Const. Art. IV, § 27*), and inasmuch as the first general election under the present constitution was held in 1868, all subsequent elections for clerk were required to be held at each alternate general election, reckoning from 1868, to wit: at the general elections in 1872, 1876 and 1880, and, consequently, the next election for clerk cannot be held until the day fixed for the general election in 1884. Thus it appears that section 160 of the General Statutes of 1882, prescribing the day of the general election in 1884, as the time for holding the election for clerk, is not only not in conflict with constitution, as was argued in this case, but is in direct conformity thereto.

We are therefore of opinion that there was no legal authority for holding an election for clerk of the Court of Common Pleas for Horry county on the seventh day of November, 1882, and hence that the board of State canvassers could not have been required to declare the result of an election held without such authority. The judgment of this court, in conformity with these views dismissing the petition, has heretofore been rendered.



---

Statement of the Case.

---

THE STATE OF SOUTH CAROLINA, *EX RELATIONE* COLEMAN,  
v. TOWN COUNCIL OF CHESTER.

1. An act entitled, "An act to provide a local option law for the incorporated cities, towns and villages of this State" (17 Stat. 893), declared in its fourth section, that the act should not apply to any city, town or village in which the sale of liquors is now, or shall hereafter be, prohibited by legislative enactment. *Held*, that the act related to but one subject—local option—which was expressed in its title.
2. An act to prohibit the sale of intoxicating liquors in the town of Chester (17 Stat. 1059), does not violate article I., section 12, of the constitution, which declares that "no person shall be subjected in law to any other restraints or disqualifications, in regard to any personal rights, than such as are laid upon others under like circumstances."

---

Original application for writ of *mandamus*.

This was a petition entitled the State of South Carolina, *ex relatione* John K. Coleman and others, against the town council of Chester. The opinion states the case.

*Mr. S. P. Hamilton*, for relators.

The clauses of the constitution violated are article II., section 20, and article I., section 12. An act violating article II., section 20, is unconstitutional. 13 *Mich.* 482; 12 *Geo.* 36. The title of the local option law is general and sweeping, and in it can be found no intimation that it was intended to prohibit local option in certain cases. This section is also violated by the act to prohibit the sale of liquor in Chester, the title of which makes no allusion whatever to the local option law. But there is a broader and more important provision violated, article I., section 12. This section prohibits discrimination. Under its charter, the citizens of Chester have a right to vote—under the local option law they have a right to vote—but the fourth section of the local option law, and the act to prohibit the sale of liquors in Chester, take away the right accorded in a general

---

November Term, 1882.

---

law, to citizens of other towns, and is thus a disqualification of electors of Chester. *Cool. Cons. Lim.* 391. A case most apposite to ours is *Kelly v. The State*, 6 *Ohio St.* 269. The local option law must not be confounded with acts controlling municipal corporations in the matter of police regulations, for it divests municipalities of the power to determine the question of license or no license, and gives it to the people. Even the exercise of police power by the legislature may be unconstitutional.

*Messrs. E. C. McLure, A. G. Brice, contra.*

December 7th, 1882. The following order was passed :

PER CURIAM. On hearing the petition and return, with the agreement of counsel, it is ordered that the petition be dismissed for reasons which will be stated in an opinion hereafter to be filed.

March 19th, 1883. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. This was an application for the writ of *mandamus*, heard by this court under and by virtue of its original jurisdiction in such cases. The character of the case and the questions involved will appear from the statement which follows.

An act of the General Assembly of this State, approved February 9th, 1882, and known as the local option law, provided, that upon the petition of one-third of the number of citizens who voted at the next preceding municipal election of any incorporated city, town or village in this State, the council of such city, town or village was authorized and required to submit the question of license or no license, to the qualified electors of such city, town or village, at a special election to be holden, &c. By the fourth section of this act it was further provided, that it should not apply to any city, town or village in which the sale of ardent spirits is now, or shall hereafter be prohibited by legislative enactment. On the same day that this act was approved, another act, known as "An act to prevent the

---

Opinion of the Court.

---

sale of spirituous liquors in the town of Chester, in Chester county," was also approved.

On November 11th, certain citizens of the town of Chester, equal and exceeding in number the one-third of the votes cast in the preceding municipal election in said town, petitioned the town council of Chester to hold a special election under the local option law, at which the question of license or no license should be submitted to the qualified electors as provided for in said act. This petition was refused on the ground that the act to prevent the sale of spirituous liquors in the town of Chester being of force, the council was prohibited from entertaining the petition by virtue of the fourth section of the local option law itself. Thereupon the petitioners instituted this proceeding for *mandamus* to require the town counsel to grant their prayer.

The questions involved do not demand of this court any extended discussion of the principles upon which the writ of *mandamus* depends. It may be admitted, so far as this case is concerned, that if the positions taken by the petitioners are sound, the writ should be ordered. We will therefore confine our examination to these positions.

The petitioners claim that the fourth section of the local option law, as well as the act to prevent the sale of spirituous liquors in the town of Chester, are unconstitutional, and consequently that the local option law stands unaffected thereby, which law thus unaffected being applicable to all the towns, cities and villages in the State, entitles the petitioners to the relief which they seek, and this is the question in the case.

It is urged that the fourth section of the local option law is unconstitutional because in conflict with section 20 of article II., of the constitution, which provides that "every act or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title." This section no doubt contains a wise provision, and if properly observed would tend greatly to prevent confusion and doubt as to the exact meaning and intent of legislative enactments, and to this end it should be enforced by the courts in all proper cases, due care being exercised lest a too strict construction might defeat its very object and purpose by clogging legislation and loading down our

---

November Term, 1882.

---

statute books, with numberless separate acts wholly unnecessary to the end designed. By such a construction few matters could become the subject of legislation in a single act. Every qualification and condition imposed would have to be embraced in a separate act, which would make it difficult and tedious to ascertain the statute law in any matter, as all the acts scattered through the statutes would have to be examined before any conclusion could be reached.

Take, for example, the general appropriation act. Every section, in fact almost every line in a strict sense, refers to a different subject as different appropriations and for different purposes are certainly made, and if each of these had to be in a separate act it would entail infinite confusion in a matter of the highest importance to the State. It can not be that the framers of the constitution ever intended that such a construction should be placed upon this section. On the contrary, while enforcing it when necessary, it should be at least so construed as to prevent the results indicated above.

Now can it be said that the fourth section of the local option law under consideration is in violation of section 20, article II., of the constitution, when construed under the light of the principle announced above? The title of the local option law is as follows: "An act to provide a local option law for the incorporated cities, towns and villages of this State." The subject expressed in this title is "local option." Does the fourth section relate to a different subject? That section simply provides that the act of which it is a section "shall not apply to any city, town or village in which the sale of ardent spirits is now or shall hereafter be prohibited by legislative enactment." This is the whole of the fourth section. It is apparent that it does not relate to a different subject from that expressed in the title of the act; on the contrary, it has direct reference to that subject and to no other, to wit, local option.

It is true, under the operation of the third section, the privilege of local option may be allowed to some towns, cities and villages, which is denied to others under the fourth section, yet this is not the incorporation of a new subject into the act different from that expressed in the title, but it is simply limiting and

---

Opinion of the Court.

---

qualifying that subject in its application to the towns, cities and villages of the State in the nature of a proviso, an exception to the act. If the relators' construction be the correct one, no exceptions could be made in the application of acts by provisos. A separate act would always be necessary.

Next as to the act to prevent the sale of spirituous liquors in the town of Chester. The relators contend that this act violates section 12, article I., of the constitution. That section is as follows: "No person shall be disqualified as a witness or be prevented from acquiring, holding and transmitting property or be hindered from acquiring education, or be liable to any other punishment for any offense or be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances."

It is urged that this section was intended to prevent discrimination in legislation as to personal rights. There can be no doubt but that such was its intention, and no one can fail to appreciate the importance and the wisdom of such a restriction upon legislative power. It underlies our constitution and is a fundamental principle in republican governments, and should not be invaded.

But we do not see its application to this case. We do not see that any citizen of Chester is deprived of any right which any other citizen of that town is allowed. It is true that the provisions of the charter of Chester may be different from those which appear in some of the other towns in the State, but it certainly can not be urged seriously that the section of the constitution referred to, is violated by such difference. And yet, upon the relators' construction, such would be the result. Not only so, but when that construction is pressed to its legitimate result it would necessitate exact uniformity in all charters, both public and private. No distinction could be made. The condition and circumstances requiring in one place a different municipal government, from another demanding the exercise of different powers and duties, would have to be disregarded, and a dead sea of exact uniformity established. This could not have been the purpose of this section.

---

November Term, 1882.

---

The judgment of this court has already been pronounced dismissing the petition of the relators; and it is ordered that this opinion be filed as containing the principles upon which said judgment is based.

---

## CHALMERS v. GLENN.

1. A cause of action exists when the legal rights of one party have been invaded by another, and unless facts to show the existence and the invasion of such rights are stated in the complaint, it will be held bad on demurrer.
  2. A complaint which stated that money belonging to an estate had by order of court been lent to defendant under his bond to account "upon a final settlement of the estate" for the sum received, but which did not allege that any settlement had yet been had or attempted, or that defendant had failed to account, does not state facts sufficient to constitute a cause of action.
  3. A clerk of court in accordance with the terms of an order of court, lent money in his hands to A. upon A.'s bond to account for it upon final settlement of the estate. *Held*, that a complaint against A. by a succeeding clerk stating these facts and asking to have the bond reformed so as to provide for the payment of interest, did not show any cause of action in the plaintiff.
- 

Before PRESSLEY, J., Newberry, February, 1882.

The opinion states the case.

*Mr. W. H. Lyles*, for appellant.

*Messrs. Jones & Jones, George S. Mower*, contra.

February 15th, 1883. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. In 1866 a bill was filed in the Court of Equity for the partition of the real estate of G. W. Glenn, late of Newberry county, to which his heirs-at-law were parties, plaintiffs and defendants. A decree was made therein, directing a sale of certain portions of said real estate

---

Opinion of the Court.

---

partly for cash and partly on a credit, and the proceeds ordered to be distributed according to the rights of the parties. In pursuance of this decree, Silas Johnstone, Esq., the then commissioner in equity for said county, sold the lands embraced in the order, and distributed the cash proceeds. The Court of Equity having been abolished, the case was transferred to the Court of Common Pleas under the act for that purpose, and Jesse C. Smith the clerk of the Court of Common Pleas, from time to time collected a part of the credit portion of the sales.

Afterwards to wit: in January, 1875, an order was made in the cause in the Court of Common Pleas to "loan" out to Dr. George W. Glenn, a son of the deceased and one of his heirs-at-law, such portion of the credit sales as Smith had collected, or that might be paid to him upon Glenn securing the payment either by personal security, or collaterals, or both, upon final settlement of the estate of the deceased. Pursuant to this order Smith, the clerk, loaned to George W. Glenn the funds in his hands amounting to \$1,088.31, securing the same by the bond of Glenn, with Mattie S. Glenn and Thomas W. Weir as his sureties, the condition of the bond being "that Glenn should well and truly account for the sum of one thousand and eighty-eight dollars and thirty one cents, upon a final settlement of the estate of George W. Glenn deceased."

The bond was joint and several and made payable to Jesse C. Smith, clerk of said court, his successors in office and assigns in the penal sum of \$2,200. The term of office of Smith expired, and E. P. Chalmers, the plaintiff, is the present clerk, or was when this action began. The prayer of the complaint is, first, to have the bond reformed so as to provide for the payment of interest to be paid annually on the amount lent to Glenn, alleging that this stipulation was left out by mistake in drawing the bond; second, for judgment for said sum of \$1,088.31 with interest thereon, computed with annual rests, and, third, for such other and further relief as to the court may seem just, with costs.

The defendants demurred to the complaint (which stated only the above facts), upon the ground that it did not state facts sufficient to constitute a cause of action. Upon the hearing Judge Pressley sustained the demurrer, with leave to the plaintiff to

---

November Term, 1882.

---

amend his complaint by adding thereto such allegations as he might be advised, on payment of costs of the demurrer. From this order the plaintiff has appealed, alleging error in that the judge sustained the demurrer.

The question for us to consider is, does the complaint allege a cause of action? This involves the preliminary questions, what is a cause of action? and, to what extent shall it appear in the complaint so as to be sufficiently stated? There is but one form of action under the code, and at law, this action must be for one of three purposes, to wit: the recovery of money, the recovery of real estate, or the recovery of personal property. The cause of action must be that which gives the plaintiff the right as against the defendant to institute the action for the recovery which he seeks, and it depends upon the nature of that recovery. If he seeks money from the defendant, it must be on account of the fact that defendant is under legal obligation to pay him money, and has neglected or refused to do so, his cause of action in such case would be his right to the money and the neglect or refusal of the defendant to pay it. So, if he seeks the recovery of real or personal property, his cause of action would consist of his right to it and the withholding it by defendant. Thus, generally, it may be said that a cause of action exists where the legal rights of one party have been invaded by another.

Now as to the statement in the complaint. It is a general rule, in fact, invariable, that to entitle a plaintiff to recover, he must prove all the facts constituting his case or cause of action; he must prove the facts constituting his right, and its invasion by the defendant. It is another general rule, that the plaintiff can offer no testimony except to such facts as he has alleged in his complaint. It follows, therefore, that he must allege in his complaint all the facts showing his right, and also those showing its invasion by the defendant, and the facts thus alleged must in law upon their face, on the one side entitle him to the right which he claims, and on the other amount to an invasion by the defendant. If his complaint is defective in either of these particulars, he will not only be denied the privilege of supplementing the facts by testimony, but his complaint will fail on



---

Opinion of the Court.

---

demurrer, for the want of stating facts sufficient to constitute a cause of action.

In this action the plaintiff seeks to recover money, and he founds his right thereto upon the bond already mentioned. Has he stated facts showing his right to the bond, that the defendants are under obligation to pay him money on account of it, and that they neglect and refuse to do so? Waiving the question as to his right to the bond, does the statement of facts show the two latter requirements? The condition of the bond is that George W. Glenn shall account on final settlement of the estate of George W. Glenn, deceased, for the sum of \$1,088.36. No rights accrue to the plaintiff under the bond, therefore until there is failure on the part of Glenn thus to account on the final settlement mentioned, and no obligation or liability rests upon the defendants until said failure, and there can be no invasion of the right of the plaintiff by the defendants until that right accrues, and then the obligation attaches. All these are suspended until, and depend upon, the failure of Glenn to account according to the terms of the bond.

The failure to account, then, is not only a necessary fact in the plaintiff's cause of action, but a most essential one. It is the central fact in the case, and without which the plaintiff's cause of action vanishes, whatever else may be found in the complaint. Upon an examination of the complaint, it will be found that this essential fact is not stated. There is no allegation that the estate of George W. Glenn has been settled or attempted to be settled. There is no allegation that this has resulted from the acts of Glenn, the borrower, or his sureties.\* The matters in the estate, so far as appear in the brief, stand precisely as they stood when the bond was given. At that time a subsequent settlement was thought necessary, and contemplated, as appears in the order of the court authorizing the clerk to lend the money in his hands to Dr. Glenn. This order directed that it should

---

\*The only allegation in the complaint upon the subject is contained in the ninth paragraph, and is as follows: "That the persons entitled to the distribution of said fund as ascertained by the decree and orders of said Court of Equity hereinbefore alleged are now demanding the same of this plaintiff, and it is necessary to collect said fund in order that it may be distributed."—REPORTER.

---

November Term, 1882.

---

be accounted for on final settlement. It was borrowed on those terms, and cannot be demanded sooner.

It is not for this court to speculate as to the reasons which influenced the Court of Common Pleas to grant the order to lend the money. It may have been because the estate was not ready for a settlement, and it was thought best that one of the parties in interest should have the use of it, rather than it should lie idle in the clerk's office; or it may have been that it was known or supposed that Dr. Glenn, as an heir, would ultimately be entitled to it, or the most of it, and it was better that he should have it at once, to be accounted for on final settlement. But this makes no difference. He obtained it under an order of the court, and he can only be made answerable upon the terms by which he obtained it, and which appear in his bond. The failure of the plaintiff to allege this material fact upon which his right, as well as the obligation of the defendants depended, is fatal.

As to the prayer to have the bond reformed. The bond seems to have been given in accordance with the terms of the order of the court, authorizing Glenn to get the money. The clerk would have had no right to impose other terms than those imposed by the court. These facts appear in the complaint, and are sufficient to show that the plaintiff has no cause of action on that ground.

It is the judgment of this court that the order of the Circuit Court be affirmed, with the right to the defendants to answer should the plaintiff avail himself of the privilege to amend, which Judge Pressley's order, sustaining the demurrer, allowed him.

---

NICHOLS v. BRIGGS.

1. So much of an answer as stated the reasons which actuated the defendant in interposing a plea of the statute of limitations, was, on motion, stricken out by the Circuit judge as irrelevant. *Held*, that in this there was no error.
2. The act of 1880 (17 *Stat.* 415), amending the code, so as to make twenty years the period of limitation of actions on contracts secured by mortgage,

---

Circuit Decree.

---

had no retroactive force, and did not apply to a sealed note, which fell due in 1875.

3. Under the statute then of force such note was barred in six years, but not discharged, and a mortgage of lands given to secure the note retained its lien, and might be foreclosed at any time within twenty years of its execution.
- 

Before COTHMAN, J., York, March, 1882.

Action by John Nichols against B. F. Briggs. The opinion states the case.

The Circuit decree was as follows :

The sole question discussed before me by the counsel engaged in the cause, and with much elaboration, may be thus stated : Can an action for foreclosure of a mortgage of real estate be maintained, where the note which it is given to secure has been barred by the statute of limitations? It cannot be questioned, since the decision of the court in *Arnold v. McKellar*, 9 S. C. 335, that the amendment to section 113 of the code (see *Lynch's Code*, p. 53), as of the 25th of November, 1873 (see A. A. of that year), notwithstanding the supposed irregularity of its ratification and the subsequent reenactment of it in the A. A. of 1875, is valid and effectual ; and that sealed notes in South Carolina are subject to the statutory limitation of six years, as therein provided.

It is also true, as matter of law, that this action having been commenced in January of the present year, the statutory bar is complete, unless there be some existing cause to prevent its operation. No proof to this effect was offered upon the trial, and no suggestion of the kind was made in argument by the learned counsel for the plaintiff, who insisted, with the support of many authorities, that he was entitled to a decree of foreclosure of his mortgage, *non obstante*. The defendant's counsel, with equal zeal, as stoutly denied the plaintiff's right in this regard. The question thus presented is one of some difficulty of determination, owing to the great conflict of foreign authorities upon the subject, (to which, I am forced to express my regret, that we are becoming so much addicted,) as also on account of

---

November Term, 1882.

---

the apparent absence of any direct adjudication of the matter by our own courts.

The plaintiff's counsel, with great propriety, insists that the statute of limitations does not discharge or extinguish the debt, but only takes away the remedy for enforcing the payment of it. Since the case of *Sturges v. Crowninshield*, decided by the Supreme Court of the United States as far back as 1819, and reported in 4 *Wheat.* 122, and followed by numerous decisions of our own court, this doctrine may be accepted without question. He further insists, and apparently with equal confidence, that though the debt be barred, the lien of the mortgage should be enforced; and to support this proposition, cites chapters 26 and 27 of 2 *Jones Mort.*, and the numerous authorities there to be found.

Upon the other hand, the learned counsel for the defendant contends: That in South Carolina the mortgage is but an incident of the debt, deriving its vitality and perpetuity only from the debt itself, and that it cannot, in the very nature of things, survive the substance of which it is but the mere shadow; that the act of 1791, so explicit in this regard, was a departure from the English doctrine and has wrought a fundamental change in the nature and character of mortgages, and of the means of enforcing them; that our own decisions have steadily maintained this divergence; citing numerous authorities, among others, *Simons v. Bryce*, 10 *S. C.* 367; *Warren v. Raymond*, 12 *S. C.* 21; *Reeder v. Dargan*, 15 *S. C.* 175.

And not with unbecoming confidence does he rely upon the opinion of Dargan, Ch., in *Gibbes v. Holmes*, 10 *Rich. Eq.*, 487, in which that learned judge says: "If a mortgage be given to secure a simple contract debt, when the debt is barred, the mortgage is discharged. Anything that satisfies the debt discharges the mortgage." Unfortunately for the defendant, however, this is but *obiter dictum*, as the question to which this would otherwise have been decisive was not before the court. Nevertheless, as the positively expressed opinion of a very great judge in his own times—and there were giants in those days—it is entitled to great consideration. The added expression above "Anything that satisfies the debt," &c., seems to me, however,

## Circuit Decree.

greatly to weaken the force of the first proposition; for whatever contention there might be as to that, there never could have been a doubt as to the second, which clearly relates to satisfaction of the debt—not to any suspension or abridgment of the remedy. Satisfaction is the whole object, aim and end of the law in all things. I have ventured to say this much in the way of respectful criticism, for the reason that the expression is very positive; it was much relied on by the defendant's counsel, and if other reason be needed, it may be found in what Judge Wardlaw said under like circumstances in *Mitchell v. Bogan* (I believe) in venturing to differ with Judge Nott.

It might not be matter of unprofitable speculation to inquire how far this expression may have been evoked by the peculiar remedy for foreclosure, furnished by the act of 1791, which, it will be remembered, was a proceeding at law, and was bottomed upon "judgment being obtained in the Court of Common Pleas." But I forbear. It surely could never have been successfully contended in South Carolina that the right of foreclosure in equity, which became, long before the abolition of the Court of Equity, as such, the universal mode of proceeding, was absolutely dependent upon the character or quality of the bond or debt intended to be secured.

In the case of *Gillett v. Powell, Spears Eq. 143*, property was sold and bonds and mortgages taken for the purchase-money. Foreclosure of one of these was sought, and it was discovered that the bond had been altered in a material part and thereby made void. There was no reference in the mortgage to the bond as produced in its mutilated condition. Chancellor Harper, in delivering the circuit decree, which was affirmed on this point by the whole court, said: "But I am of opinion that the alteration of the bond does not affect the mortgage, and that it must be taken as evidence of the debt. If the mortgage alone had been taken, there can be no doubt but that it would have constituted a specialty debt. At law, it is regarded as a conveyance of the property; in equity, as evidence of the debt intended to be secured by it. \* \* \* The defendant is estopped by his deed to deny the existence of the bond." See upon this point, in part, *McCaughrin & Co. v. Williams*, 15 S. C. 505.

---

November Term, 1882.

---

Perhaps what has been already said is sufficient to show the bent or inclination of my mind ; but in the view which I shall now take of this case, it is not necessary or proper even that I should make a decision of this vexed and interesting question. It is somewhere related of King James I. of England, who largely affected learning and the society of learned men, that upon one occasion he summoned to his presence the *savans* of his time and propounded to them the following inquiry: "Why is it that a fish placed in a bowl of water filled to the brim will not displace a particle of the contents of the vessel?" Many learned and scientific and highly satisfactory replies were given by the several philosophers interrogated in turn, until the last of the wise men cautiously inquired, before undertaking to account for the alleged phenomenon, if, indeed, the fact were so? Actual experiment showed that it was altogether otherwise. Can it be so in this case? Let us see:

On June 5th, 1874, the defendant made and delivered his sealed note to the plaintiff, secured by the mortgage in question, for the sum of \$500, payable twelve months after date. On June 5th, 1875, the note became due, and the statute began to run. On December 24th, 1880, the legislature (17 *Stat.* 415) amended section 113 of the code, by extending the time for bringing actions "upon bonds or other contracts in writing, secured by mortgage of real property," to twenty years. The statute of limitations had operated upon the sealed note before the court for about five and a half years, and it had still about six months to run before the bar should be complete. What effect did the extension have upon "the contract in writing" secured by the mortgage here? The answer will be found in the case of *Wardlaw v. Buzzard*, 15 *Rich.* 160, and is in these words:

"\* \* \* Nor was it denied that the legislature might extend the statute of limitations before the bar was complete without impairing the obligation of the contract. In fact, its extension gives additional vitality to the contract, and furnishes no ground of complaint to the debtor or creditor. The debtor, if he wishes to pay can do so; and if the creditor desires to sue,

---

Opinion of the Court.

---

there is nothing in the extension to prevent him." This seems to me to be the conclusion of the whole matter.

Wherefore, it is ordered, adjudged and decreed that it be referred to the clerk of the Court of Common Pleas for the county of York, to inquire into and compute the amount due upon the demand herein sued upon; and that upon such ascertainment, that the plaintiff have judgment of foreclosure of the premises mortgaged and described in the complaint, in the usual form, for his debt, interest and costs; and that the plaintiff herein have leave to move for any further order that may be necessary to effectuate the judgment herein rendered.

*Messrs. Hart & Hart*, for appellant.

*Mr. W. B. Wilson*, contra.

February 15th, 1883. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. This was an action to foreclose a mortgage upon a tract of land, executed by the defendant on June 4th, 1874, "for the better securing the payment" of his note under seal for \$500, bearing date the same day, and payable one year thereafter (June 4th, 1875), with interest from date. The action was commenced January 14th, 1882, and the defense was the statute of limitations. It was insisted that from the time the note fell due, June 4th, 1875, until the action was brought, January 14th, 1882, more than six years had expired, and recovery at law on the note being barred by the statute of limitations, the defendant was not liable to the plaintiff in any way whatever, either on the note or mortgage; adding to the third paragraph of his answer a statement that he invoked the plea of the statute "in order to reimburse himself for one-half of the Gazaway Wilson lands, of which he was fraudulently deprived by the plaintiff herein, by reason of the plaintiff taking advantage of the fact that the agreement that the plaintiff should purchase the said lands for the joint use of himself and defendant was not in writing."

The cause came on to be heard before Judge Cothran, who,

---

November Term, 1882.

---

upon motion of the plaintiff's counsel, granted an order to strike out so much of paragraph three of defendant's answer as undertook to assign his motive for invoking the plea, viz.: all after the words "due and owing by defendant to plaintiff." The judge then considering the case, disallowed the plea of the statute of limitations, and gave the plaintiff a decree of foreclosure for the amount of the debt, on the ground that under the amendment of the code in 1880, enlarging the period of limitations as to "notes secured by mortgage of real property," the note in question was not barred by the statute of limitations.

From this judgment the defendant appeals to this court upon the following exceptions: "1. His Honor erred in striking from the answer of defendant the unnumbered section following section three, it not being 'matter of right' to plaintiff that same should have been stricken out. 2. His Honor erred in not holding that this action, for foreclosure of a mortgage of real estate, cannot be maintained, the action not having been brought within six years, the time limited for its commencement after the debt matured, as evidenced by the note and by it alone. 3. His Honor erred in holding that the act of December 24th, 1880, applied to the cause of action herein. 4. His Honor erred in not adjudging that the complaint be dismissed. 5. The decree is in other respects misleading and contrary to law."

As to the first exception, in reference to the order striking out a portion of the answer as irrelevant, it is only necessary to say that matter is irrelevant when it has no substantial relation to the controversy between the parties to the action, and that the code (section 183) provides that "If irrelevant and redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby." "An answer, otherwise good, may contain a mass of unnecessary or redundant matter, which seems only to encumber the proceedings and conceal or obscure the real issues. In such cases the plaintiff should move for an order striking out such matter as 'irrelevant.'" 2 *Wait Pr.* 437.

The other exceptions will be considered together. The old statute of limitations, made of force in this State, did not apply to bonds or other instruments under seal, but in 1870 the Code



---

Opinion of the Court.

---

of Civil Procedure was adopted, which, in title 2, under the head of "time of commencing civil actions," provided as follows:

"Sec. 96. The provisions of this title shall not extend to actions already commenced, or to cases where the right of action has already accrued, but the statutes now of force shall be applicable to such cases."

"Sec. 113, Subd. 2. Within twenty years, an action upon a sealed instrument." In 1873, this provision was amended by adding the words "other than notes or personal bonds for the payment of money only, whereof the period of limitations shall be as prescribed in the following section" (that is to say, six years), 15 *Stat.* 496. In 1880, the provision was again amended by changing the phraseology, as follows: "An action upon a bond or other contract in writing, secured by a mortgage of real property," so that said subdivision, with the amendments thereto, shall read as follows: "Subdivision 2. An action upon a bond or other contract in writing, secured by a mortgage of real property, an action upon a sealed instrument other than a sealed note and personal bond for the payment of money only, whereof the period of limitations shall be the same as prescribed in the following section" (six years), 17 *Stat.* 415; *Gen. Stat.* 1882, *Code*, § 111.

According to these provisions of the law, was the sealed note secured by a mortgage of real property in this case, barred by the statute of limitations, on January 14th, 1882, when these proceedings were instituted? The note fell due June 5th, 1875, while the amendment of 1873 was the law, making the limitation upon all sealed notes for the payment of money only six years; and as more than that time had elapsed before January, 1882, when the action was commenced, the note was barred by the statute, unless there was some good reason to the contrary. But it is urged that before the bar of the statute was complete, the legislature, on December 24th, 1880, passed the second amendment above referred to, which restored the twenty years as originally provided by the code, as to "an action upon a bond or other contract in writing, secured by a mortgage of real property," and that, as the note in this case was so secured, the said

---

November Term, 1882.

---

second amendment included it and had the effect of extending the statute of limitations as to the note before us from six to twenty years. To this was opposed the view that, although the last amendment did change the statute as to notes secured by mortgage of real property, it was only prospective in its operation, and did not extend the period of the statute as to any contract made before the passage of the amendment.

Did the amendment include contracts in existence at the time it was passed, or should it be construed as applying only to contracts thereafter to be made? There is no doubt that the statute of limitations relates to the remedy and not to the contract itself, and that the legislature had the power, before the bar was complete, as to contracts then in existence, to extend the time necessary to complete the bar, without impairing the obligation of such contracts. The question here, however, is not whether the law-makers had such power, but whether in this case they exercised it. The general rule certainly is that "statutes are not to be construed retrospectively, or so as to have a retrospective effect, unless it shall clearly appear that it was so intended by the legislature." *Ex parte Graham*, 13 Rich. 277. It may be true, as stated, that statutes of limitations relate only to the remedy, and are enforced according to the *lex fori*, that is to say, according to the law of the State where the party is sued; but we do not understand that these reasons extended the rule so far as to make applicable only the law of force at the time the party is sued.

It seems that these statutes, affecting the remedy only, constitute no exception to the general rule, that laws and amendments thereof of the same State operate only upon matters which arise after their passage, unless they otherwise expressly declare. "In this country, statutes of limitations are, as a general rule, applied only to a right of action which is to commence *in futuro*, and are not retrospective in their operation. And it is a well-settled principle of law, that the courts are to give such statutes a prospective operation, where there is nothing indicating a different intention on the part of the legislature which enacted the statute." 7 *Wait Ac. & Def.* 228.

---

Opinion of the Court.

---

The law passed in this State, in 1861, "To extend relief to debtors, and to prevent the sacrifice of property at public sales," commonly called the "stay law," and which received construction in the case of *Wardlaw v. Buzzard*, 15 Rich. 158, is no exception to the rule, but rather confirms it. That act shows upon its face that it was the intention, indeed the very purpose of the legislature, that it should apply to contracts in existence at the time of its passage. The fifth section was in these words: "That the operation of the statute of limitations be and the same is hereby suspended during the period in which this act is of force;" and the Court of Errors, in their judgment, said: "There is no distinction made as to the time when the causes of action arose, and they unquestionably meant and intended to embrace all money demands. If not intended to apply to causes of action then existing, the fifth section was unnecessary, and we cannot suppose the legislature would be guilty of the folly of passing an act suspending the operation of the statute of limitations, if intended only to apply to causes arising thereafter, when the act itself was limited to the duration of one year." In the amendment under consideration no such intention is manifest. From its terms we are unable to say that it was clearly intended to operate retrospectively and include contracts in existence at its passage.

Besides, from the form and manner in which the amendment was inserted into the code, certain words having been added to the subdivision 2 of the section as it stood, we think the added words were intended to take their place in the context, remaining as a part of the section, and, of course, controlled by the declaration still unrepealed and standing at the head of the whole title—"The provisions of this title shall not extend to actions already commenced or to cases where the right of action has already accrued." "When the amendment of a statute is made by declaring it shall be amended so as to read in a given way, the amendment has no retroactive force; the new provision is to be understood as taking effect at the time the amended act would otherwise become the law." *Potter's Dwar.* 165; *Cooley Const. Lim.* 461. As the law now stands, a note secured by a mortgage of real property executed since the amendment of

---

November Term, 1882.

---

1880, would not be barred in less than twenty years, but as the note in this case had been executed and was running to maturity when it was passed, we think that it must fall under and be controlled by the former amendment of 1873, and, according to its terms, being a sealed "note for the payment of money only," was barred by the statute of limitations, in January, 1882, when the action was commenced.

But the most difficult question still remains. Assuming that recovery on the note considered by itself could not be had on account of the statute of limitations, must the mortgage of real property, given to secure the same debt, also be considered as barred? The mortgage, after reciting the execution of a sealed note for \$500, proceeds to declare that, "in consideration of the said debt and sum of money aforesaid, and for the better securing the payment thereof to the said John Nichols," &c. A mortgage on land is an instrument of such character as exempts it from the bar of the statute in less than twenty years, so that if it is barred in this case, it must be upon some ground growing out of its relation to the note, which imposes upon it a like fate, that the remedy, which the law afforded to recover the note being barred, must also be barred as to the mortgage.

It is certainly remarkable that this question, so far as we are informed, has never been directly decided in this State. It is true that in *Gillett v. Powell, Spears Eq.* 145, where a bond given to secure the debt had been altered and thereby destroyed, Chancellor Harper held that a mortgage given to secure the same debt without making any reference to the bond, was not thereby affected, but should be upheld and enforced as an independent security. It is likewise true that in the case of *Gibbes v. Holmes, 10 Rich. Eq.* 487, Chancellor Dargan said that, "It is a misapprehension, I think, to suppose that the statute of limitations has any application to this case. If it is meant to apply as a bar to the debt, it cannot prevail. If a mortgage be given to secure a simple contract debt, when the debt is barred the mortgage is discharged. Anything that satisfies or destroys the debt discharges the mortgage;" but it is manifest from the extract itself that the point as to the effect of the statute on the mortgage was not involved in the case, and, as

## Opinion of the Court.

we take it, had not been argued. The declaration cannot be regarded as anything more than one of those expressions which fall from a judge in the glow of argument, and are known as *obiter dicta*. We must regard the question as still open, and the duty imposed of deciding it upon general principles and such outside authorities as may appear analogous and sound.

There is no doubt that in this State the act of 1791 (except in one state of facts) destroyed the legal estate of the mortgagee, and, adopting the equity doctrine, declared that the mortgagor is the legal owner of the land and the mortgagee only a creditor, with a lien on the land for the security of his debt; but it must be kept in mind that there is a difference between the debt itself and the securities for it. The debt is one, but there may be a number of securities of different kinds, personal, real, pledge, mortgage, collaterals, &c. The note given is only evidence of the debt and one of the means of collecting it, and if there is a mortgage, that is only another security for the same debt. It is true that in the case of *Cleveland v. Cohrs*, 10 S. C. 224, it is said that "The bond represents the debt, while the mortgage is a mere security for the payment of such debt. One is the principal, the other is the mere accessory." There is nothing in this inconsistent with the views suggested. The bond, undoubtedly, is the most common assurance, and for this reason, possibly, it may be regarded as the primary security and a mortgage as cumulative, or secondary, but in no proper sense can the mortgage be regarded as a security merely for the bond, which, being only the evidence of the debt, may be displaced by substitution or lost or destroyed, leaving the mortgage as a subsisting security for the debt in a new form. *Gibbes v. Railroad Company*, 13 S. C. 253, and authorities.

"A mortgage being given as a security for a debt, the general rule is that no mere change in the mode or time of payment, nothing short of an actual payment of the debt or an express release, will operate as a discharge of the mortgage. The lien lasts as long as the debt." 1 *Hill. Mort.*, § 3. The mortgage would have been good as a security for the \$500 even if the bond had never been given. As the court say in the case of *McCaughrin & Co. v. Williams*, 15 S. C. 505, "the mortgage debt exists inde-

---

November Term, 1882.

---

pendently of the note—the validity of the mortgage does not depend upon the description of the debt contained in the deed, nor upon the form of the indebtedness, whether it be by note or bond or otherwise: it depends rather upon the existence of the debt it is given to secure.” Or, as said by Chancellor Harper in *Gillett v. Powell*: “But here, as I have said, the mortgage has no reference to the bond, and I cannot consider that the party claiming under it is in a worse situation than if the bond had never been taken. If he had taken a single bill and a bond with a penalty, or a bond with and one without security, though there might have been an equity to restrain the enforcement of both, I do not see how the alteration of one could vitiate the other.”

We do not understand that this doctrine, as to the different securities for the same debt, conflicts with that other as well established, that payment or anything else which reaches to the debt itself and discharges it, will at the same time discharge all the securities of every kind. We agree that anything that satisfies or discharges the debt, discharges the mortgage of course. What effect did the bar of the note by the statute of limitations have upon the debt evidenced by the note and also secured by the mortgage? It is well settled that the effect of the statute is only to take away the remedy, and not to extinguish the debt. When a security is barred the debt is not thereby necessarily discharged. *Wilson v. Kelly*, 16 S. C. 216. The rule that the discharge of the debt is a discharge of the mortgage has no application when the debt is merely discharged by the statute of limitations or a discharge in bankruptcy.

In regard to the right to enforce a mortgage lien given to secure a debt barred by the statute of limitations, there seems to be some difference of opinion in the different States, notably in California, Nevada, Texas, Nebraska, Iowa, Illinois and Kansas, but in this conflict we are content to take the general rule as laid down by Mr. Jones: “Though the debt be barred, the lien may be enforced. The fact that a debt secured by a mortgage is barred by a statute of limitations, does not necessarily, or as a general rule, extinguish the mortgage security or prevent the maintaining an action to enforce it.” 2 *Jones Mort.*, § 1204 and notes. This is the general rule, and we see no reason founded

---

Statement of the Case.

---

in principle why it should not be adopted here; indeed, it would seem to have appropriate application in this State, where the law, as it now exists, makes the statutory bar of a "bond or other contract in writing, secured by a mortgage of real property," twenty years. Although as we have held, that law in terms is not applicable to this case, yet we may fairly regard it as at least a legislative declaration that the mortgage given to secure the debt in such cases takes it out of the general rule in regard to the bar of the statute of limitations.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

GARRISON v. DOUGHERTY.

## CRAWFORD v. SAME.

The final judgment, within forty-eight hours of which a complaint for improvements under the betterment law must be filed (*Gen. Stat. § 1837*), means the judgment of the Circuit Court, even in cases where the cause is further prosecuted by appeal. Where such a complaint was not filed until *remittitur* entered dismissing an appeal, it was not within the time limited.

---

Before HUDSON, J., Marion, October, 1882.

These were actions by Vige Garrison and Ervin Crawford against John Dougherty, heard together. The Circuit judge thus states the cases:

These are actions brought against the defendant for the value of alleged betterments made by the plaintiffs upon a tract of land in the county of Marion, the possession of which the defendant, John Dougherty, had recovered of the plaintiffs in an action involving the question of title. The verdict in favor of Dougherty was rendered at the April term of the Court of Common Pleas for Marion county, A. D. 1880, and judgment thereon entered up and filed May 1st, 1880. In due season an

---

November Term, 1882.

---

appeal was taken to the Supreme Court, and by that court the judgment of the Circuit Court was affirmed. The *remittitur* was sent down to the Circuit Court, and filed in the clerk's office on April 11th, 1881. On the same day the present plaintiffs filed, each for himself, a complaint for the recovery of the value of betterments on that part of the tract claimed by each. In his answer to these complaints, the defendant, Dougherty, sets up several defenses, and among them, that the complaint in each case was filed too late. The proceedings are under chapter CXXI., sections 1-7, of the General Statutes (1872), which requires the complaint for betterments to be filed in forty-eight hours after the rendering of final judgment, or during the term of the court at which such judgment is rendered. The question presented is whether the final judgment contemplated in the statute is the judgment of the Circuit Court appealed from, or that judgment affirmed by the Supreme Court, as evidenced by the *remittitur* sent down and filed.

A reading of all the sections of the chapter providing this summary and efficacious remedy, and the prompt steps requisite to obtain the relief, satisfies me that the final judgment contemplated is the judgment of the Circuit Court. Within forty-eight hours after the rendering of such judgment, or, at furthest, during the term at which it is rendered, this claim for betterments must be filed. Hence it is that no summons is required to be served, and no notice, except the filing of the complaint, is to be given. A prompt assertion of the claim and its speedy determination are evidently contemplated, and hence the stay of all further proceedings under the judgment for the recovery of the land.

It is therefore ordered and adjudged, that the complaint in each of these cases be dismissed with costs.

The plaintiffs appealed on the following grounds: 1. Because his Honor erred in holding that the complaint in this action was filed too late, not having been filed within forty-eight hours after the judgment was entered in the Circuit Court. 2. Because his Honor erred in holding that the filing of the complaint in the case within forty-eight hours after the filing of the *remittitur* of the Supreme Court was too late, and was not in conformity



---

Opinion of the Court.

---

with the betterment act. 3. Because his Honor erred in holding that the act required the filing of the complaint within forty-eight hours after the judgment of the Circuit Court.

*Messrs. Townsend & McKerall*, for appellants.

*Messrs. Johnson & Johnson*, contra.

February 15th, 1883. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN [omitting the statement of the case]. The question is simply one of construction of the statute, which having stated that "after final judgment in an action to recover lands and tenements" &c., goes on to declare "that the defendant in such action shall, within forty-eight hours after such judgment, or during the term of the court in which the same shall be rendered, file a complaint against such plaintiff for so much money as the lands and tenements are so made better, in the office of the clerk of such court, which shall be sufficient notice to the defendant in such complaint to appear and defend against the same," &c. *Gen. Stat.*, § 1837.

The judgment is spoken of as "a final judgment," and the word "final" does ordinarily mean "relating to the end," "ultimate," "last," "latest," but, taking the whole provision together, we can not doubt that the words were intended to apply to the Circuit Court. Manifestly great promptness was intended. "Within forty-eight hours after such judgment or during the term of the court in which the same shall be rendered." There are expressions here which are entirely inapplicable to a judgment of the Supreme Court, sent down with the *remittitur*, which may not be necessarily during the term of either the Court of Common Pleas or of the Supreme Court, and can not be appropriately said to be "rendered."

The expression "final judgment," as applying to the Court of Common Pleas, occurs several times in the code of procedure. In section 11, "provided, if no appeal be taken until final judgment is entered," &c.; in section 305, "a transcript of a

---

November Term, 1882.

---

final judgment directing in whole or in part," &c., and in section 313, "Final judgments hereafter entered shall not of themselves constitute a lien," &c.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

ELLEN v. ELLEN.

1. Whether admissions of the plaintiff's grantor, while in possession of the disputed land, were sufficient evidence of the due execution and contents of an alleged lost deed, under which the defendant claimed, was a question of fact, and, therefore, properly left to the jury to be determined.
2. Recitals in a deed made by M. of a former conveyance by him to defendant's grantor (which conveyance is proved to have been lost), are evidence against plaintiff, who claims title under E., if E. matured title by twenty years' presumption of a grant from M., but not if plaintiff derived title through an adverse possession of E.
3. And declarations by M. of a gift to defendant's grantor are admissible against plaintiff, if they were made before E. took possession, claiming under a presumed deed from M., but such declarations can have no application to plaintiff's claim under an adverse possession by E.
4. After declarations by plaintiff's deceased grantor in disparagement of a claim of adverse possession have been introduced by defendant, other declarations by the same person in support of such a claim may be introduced by plaintiff in reply, only where they were parts of the same conversation already testified to, or accompanied and were explanatory of some special act of ownership.

---

Before WITHERSPOON, J., Marion, April, 1882.

This is a second appeal in this case, the first being reported in 16 S. C. 132, where the facts will be found more fully stated. For the purpose of understanding this appeal, the opinion here sufficiently states the case.

*Messrs. W. W. Harlee, Johnson & Johnson*, for appellant.

*Messrs. Townsend & McKerall, W. W. Sellers*, contra.

---

Opinion of the Court.

---

February 15th, 1883. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. This is a contest over a tract of land containing one hundred acres lying in Marion county. The plaintiff is a son of David Ellen by his second wife, the defendant being a son by the first wife. The defendant is in possession of the land, and this action has been brought for its recovery.

The plaintiff introduced a grant from the State to one Isaac Hyatt, A. D. 1792, covering the land; then a deed from Hyatt to one Robert McKenzie, Sr., dated May 19th, 1804; then evidence of a long and continued possession (some forty years) by his father, David Ellen, which he claimed was adverse; and finally a deed to himself of the said land from David Ellen, dated August 18th, 1871, and rested, claiming that the possession of David Ellen was adverse, and thereby David Ellen had acquired good title before the execution of his deed to the plaintiff, both under the operation of the statute of limitations, and also by the legal presumption of a deed from Robert McKenzie, Jr., and also from the said William B. Ellen, arising from over twenty years of possession.

The defendant claimed title from Robert McKenzie, Sr., first, by a deed executed from Robert McKenzie, Sr., to Zimri M. Ellen, a grandson, and the brother of defendant, William B., dated in 1833 or 1834; and, second, by deed from Zimri to defendant, executed and duly recorded March 12th, 1861; and he denied that the possession of David Ellen, his father, had at any time been adverse either to the title of Robert McKenzie, Sr., Zimri M. Ellen or of the defendant, but that he had always held with full knowledge of and subordinate to these titles. The defendant was unable to produce the deed from Robert McKenzie, Sr., to Zimri M. Ellen. This was alleged to have been lost when Sherman's army passed through that portion of the State, and other and secondary evidence was introduced as to its execution, among which was an admission of David Ellen, through whom plaintiff claimed. Upon this admission the defendant requested the judge to charge that this was "sufficient evidence

---

November Term, 1882.

---

of the due execution as well as the contents of such deed, and that no further proof thereof was necessary."

The defendant offered to introduce a deed from Robert McKenzie, Sr., to Robert McKenzie, Jr., containing recitals as to the boundaries, to wit, that Robert McKenzie, Sr., had given the land in dispute to Zimri M. Ellen, which was ruled incompetent as irrelevant. After the defendant had introduced declarations of David Ellen, while he was in possession in disparagement of his title as an adverse claimant, the plaintiff was allowed to introduce David Ellen's declarations also in rebuttal of this testimony. The verdict was for the plaintiff, for the land in dispute and \$300 damages.

The defendant has appealed, his appeal raising the following legal questions: First. Did his Honor err in refusing to charge as requested, "that the admission of David Ellen while in possession as to the execution of the deed from Robert McKenzie, Sr., to Zimri M. Ellen, was sufficient evidence of the due execution as well as the contents of such deed, and that no further proof was necessary?" Second. Did he err in excluding the deed of Robert McKenzie, Sr., to Robert McKenzie, Jr., with its recitals? Third. Did he err in admitting declarations of David Ellen in reply, rebutting the testimony of defendant as to declarations of said David Ellen in disparagement of his title by adverse possession? and, fourth, Did his Honor err in ruling out the declarations of Robert McKenzie, Sr., that he had given the land in dispute to his grandson, Zimri M. Ellen, and also ruling out proof that Robert McKenzie, Sr., had gone round the lines of the tract of land in dispute and shown them to his grandson, Zimri Ellen, as his own? There were other exceptions, but as they involve questions of fact they are beyond our jurisdiction and cannot be considered.

This case is now before us upon a second appeal, a new trial having been ordered in the former appeal. In that appeal the defendant excepted on the ground that the presiding judge did not instruct the jury, "that as to the deed of Robert McKenzie, Sr., to Zimri M. Ellen, the admissions of David Ellen, under whom respondent claimed, were conclusive against him not only as to its existence but as to its contents." This exception was

---

Opinion of the Court.

---

overruled by the court on two grounds: First, it appeared from a statement made by the presiding judge in refusing a motion for a new trial made on that exception, that it rested on a mistake of counsel as to the precise charge of the judge; and, second, that no request to charge had been made, and consequently no error as to this matter could be assigned upon appeal. *Ellen v. Ellen*, 16 S. C. 132, citing *Madsden v. Phoenix Ins. Co.*, 1 S. C. 24; *Abrahams v. Kelly and Barrett*, 2 *Id.* 238. On this trial the request was made. The judge declined to charge it, but stated that he "would submit all of the testimony, including the declarations of David Ellen as to the alleged lost deed, to the jury, leaving the jury to decide as to the effect of such declarations according to the weight or preponderance of the evidence."

We find nothing in the points and authorities of appellant's counsel upon this exception, nor have we been able to find any authority ourselves to sustain it. The presiding judge pursued the proper course; he admitted the testimony, that, and all other offered, bearing upon the question immediately at issue, leaving its force and effect to the jury. It was beyond his province to discuss the sufficiency of this testimony. This, under the constitution, belonged to the jury, and the judge would have been invading their powers had he charged that any special fact had been proved, and that no further evidence was required. The question at issue was whether a deed from Robert McKenzie, Sr., to Zimri M. Ellen, had ever been executed. This was a question of fact. The admissions of David Ellen were introduced to prove this fact; whether this evidence was competent was a question of law for the court, but its effect and force was for the jury.

Second. Was it error in excluding the deed of Robert McKenzie, Sr., to Robert McKenzie, Jr., containing a recital which called for lands which the grantor had given to his grandson, Zimri M. Ellen, dated in June, 1833? "The recital of a deed in another deed is evidence of the recited deed if the original is lost, against the party who executed the reciting deed, or against any person claiming under him." 2 *Phil. Ev., C., H. & E. Notes* 574. This seems to be the English doctrine, the

---

November Term, 1882.

---

evidence being received as secondary evidence, the recited deed having been lost.

In the United States, however, this evidence has been received as primary evidence, as evidence not only against the parties, but against privies in blood, in estate, and in law. See numerous authorities in *Note* 476, 2 *Phil. Ev.* 574, *supra*. "In regard to recitals, the general rule is that all parties to a deed are bound by the recitals therein, which operate as an estoppel, working on the interest, if it be a deed of conveyance, and binding both parties and privies—privies in blood, privies in estate, and privies in law. Between such parties and privies, the deed or other matter recited needs not at any time to be otherwise proved, the recital of it in the subsequent deed being conclusive. It is not offered as secondary, but as primary evidence which cannot be averred against, and which forms a muniment of title." 1 *Greenl. Evid.* 30, § 23. "But such recital does not bind strangers or those claiming by title paramount to the deed. It does not bind persons who claim by an adverse title, or persons claiming from the parties anterior to the date of the reciting deed." *Ibid.*, *Note*; *Carver v. Jackson*, 4 *Peters* 1, 83.

Now, in the case before the court, the plaintiff rested his claim in part upon a deed from Robert McKenzie, Sr., to David Ellen, presumed to have been executed from twenty years' possession by David Ellen. It is true he also relied upon the adverse possession of David Ellen. But in so far as he claimed through this presumed deed arising from David Ellen's twenty years or more possession, he was to that extent a privy to Robert McKenzie, Sr., and under the authorities above cited would be subject to recitals in the deed of Robert McKenzie, Sr., to Robert McKenzie, Jr., that deed having been executed, as alleged, anterior to the presumed deed. And in this case, this would be so whether the limited doctrine of the English authorities as to secondary evidence, or the wider doctrine of the American as to primary is the better law, the fact being that the recited deed to Zimri M. Ellen was lost, and, therefore, secondary evidence in reference thereto was admissible.

We think it was error in the presiding judge to exclude this deed if otherwise proved. The deed should have been admitted

as applicable to so much of plaintiff's claim as rested upon the presumed conveyance from Robert McKenzie, Sr., to David Ellen, arising from David Ellen's twenty years' possession or more. But it would have no application to plaintiff's title derived through the adverse possession of David Ellen. *Note to 1 Greenl. Evid.*, § 23, *supra*.

Third. "As to the admission of the declarations of David Ellen in reply, rebutting testimony of defendant as to David Ellen's declarations in disparagement of title by adverse possession." This court held in the former appeal in accordance with the doctrine laid down in 1 *Greenl. Evid.*, § 109, and in our own cases of *Turpin v. Brannon*, 3 *McC.* 266, and *Martin v. Simpson*, 4 *McC.* 263, that such declarations were admissible when they accompanied an act and were explanatory thereof. It further held that Judge Hudson did not violate this principle in his ruling, as explained by him in dismissing a motion for a new trial, where he stated "that the plaintiff was confined to proof of acts of ownership without declarations as rigidly as possible."

Judge Witherspoon seems to have gone a step beyond this rule, above. He admitted the declarations of David Ellen in support of his title as independent testimony, in reply to his declarations in disparagement thereof, introduced by the defendant. If these declarations had been part of the same conversation as that introduced by the defendant, or had been explanatory of some special act, then they might have been admissible as part of the *res gestae*, but the declarations of a party interested can never *per se* be admitted as evidence of his right. *Martin v. Simpson*, *supra*. As we understand the ruling of Judge Witherspoon, he admitted the declarations of David Ellen in support of his own title without regard to their connection with special acts and explanations thereof, but *per se* and in reply to the declarations introduced by the defendant. This, we think, was error.

Fourth. As to the exception "that the presiding judge erred in ruling out the declarations of Robert McKenzie, Sr., that he had given the land in dispute to his grandson, Zimri Ellen, and also in ruling out proof that Robert McKenzie, Sr., had gone round the lines of the tract of land and shown them to his

---

November Term, 1882.

---

grandson, Zimri, as his own." It does not appear in the brief at what time these declarations or this inspection of the lines were made. If before David Ellen took possession, claiming by presumed deed from Robert McKenzie, Sr., the evidence was admissible under the principles discussed above; if afterwards, they were inadmissible. In the absence of the facts the court can make no positive ruling upon the subject. If admissible at all, it could have no application to claim of plaintiff's title resting upon the adverse possession of David Ellen.

The other exceptions of defendant, as to the delivery of the deed from David Ellen to plaintiff, and as to the weight and preponderance of the testimony, being questions of fact, cannot be considered. It is the judgment of this court that the judgment of the Circuit Court be reversed.

---

DAVIS v. McDUFFIE.

1. Upon the reading of the complaint at the hearing, and the affidavit upon which a preliminary injunction had been granted, the complaint, on defendant's motion, may be dismissed, if not stating facts sufficient to constitute a cause of action; nor is it proper in such case that the answer should be read.\*
2. Where a purchaser at a master's sale fails to comply on the day of sale, under a verbal agreement with the master, and afterwards tenders the cash portion and offers otherwise to comply, but the master refuses, a higher bid at a resale having been guaranteed, and infants being interested. *Held*, that an action by the purchaser against the master for specific performance would not lie.
3. This case distinguished from *Yates v. Gridley*, 16 S. C. 496.
4. The proper proceeding by the purchaser was a rule against the master in the original cause still pending, and such a rule having been applied for and discharged, the purchaser's only further remedy was an appeal from such refusal.

---

Before WITHERSPOON, J., Marion, March, 1882.

---

\* See *Kennerty v. Etivan Phosphate Company*, 17 S. C. 411.



## Circuit Decree.

This was an action by Matilda E. Davis against A. Q. McDuffie and the distributees of Archibald McIntyre, deceased, commenced in December, 1880. The opinion states the case.

The Circuit decree, omitting its statement, was as follows :

Upon hearing the complaint, affidavit and order of injunction above referred to, defendants' counsel insisted that the complaint should be dismissed upon the following grounds, to wit :

1. That the complaint did not set forth facts sufficient to constitute a cause of action ; that, admitting the allegation to be true, there was no cause of action. 2. Because the court has now no jurisdiction of the matters set forth in the complaint.

The plaintiff's counsel insisted that the defendants should have demurred or given notice of a motion to dismiss the complaint, and that having answered, it was too late to object in this way. I held and adjudged that it was not necessary that defendants should have made such objection to the complaint, either by demurrer or answer, or even make a motion to dismiss the complaint ; that upon hearing the complaint at the trial, the court, of its own motion, can and should dismiss it, if it does not set forth a sufficient cause of action, or if the court cannot entertain jurisdiction, or will not grant the relief asked for.

I further hold and adjudge : That the complaint asks for a relief the court cannot grant ; that the court cannot decree the specific performance by its officer, the master, of a mere understanding or agreement by which he was to give time and indulgence to a purchaser at a sale made by him, which, in law, he had no right or authority to do, and which, in any event, he could only do with the consent of the parties in interest. *The terms of sale, fixed by the order of the court, were the law of the case, and they must be strictly followed. They cannot be altered by usage or custom.* When plaintiff obtained time and indulgence, without the consent of parties in interest, she took all the risks, and, by her own showing, forfeited all her rights as purchaser, by not complying with bid, in accordance with terms of sale. See cases of *Seymour v. Preston*, *Spears Eq.* 485, and *Baily v. Baily*, 9 *Rich. Eq.* 392.

But even if a sufficient cause of action had been set forth in the complaint, I hold and adjudge that this court cannot take

---

November Term, 1882.

---

jurisdiction now of the matters alleged, because it appears that they have already been fully heard and passed upon by a Circuit judge in open court, viz., by rule, and he has refused to order the master to make title to plaintiff. If she was dissatisfied with said decree of Judge Aldrich, plaintiff should have appealed therefrom, and not come again into the court in another form of proceeding, to ask it to correct its own errors.

It is therefore ordered and adjudged, That the complaint be dismissed with costs, that the injunction heretofore granted by Judge Hudson be dissolved, and that the master, A. Q. McDuffie, do proceed to carry out the order for sale, dated October 8th, 1880, by selling the tract of land described in the complaint herein, on the first Monday in October next, or some convenient sales day thereafter, after duly advertising same, on the terms fixed by said order.

From this decree the plaintiff appealed.

*Messrs. Townsend & McKerral*, for appellant.

*Messrs. C. A. Woods, Blue & Walsh*, contra.

February 15th, 1883. The opinion of the court was delivered by

MR. JUSTICE McIVER. Under proper proceedings instituted in the Court of Common Pleas for Marion county, which are still pending, an order was made for the sale of all the real estate of Archibald McIntyre, deceased, in separate lots or parcels, on the following terms, viz.: one-third cash, the balance on a credit of one and two years, to be secured by bond and mortgage. In pursuance of this order, the master offered the real estate for sale in separate lots, on the first Monday (being the first day) of November, 1880, when one of the lots, No. 2, was bid off by the plaintiff in this case at \$2,500, through her husband and agent, Ezra M. Davis.

The complaint, after setting out substantially the foregoing facts, alleges that on the day of sale, the agent of the plaintiff "made an agreement with A. Q. McDuffie, master, that the said

---

Opinion of the Court.

---

bid would be complied with in a reasonable time by paying the cash portion of the purchase-money, and executing a bond and mortgage to secure the credit portion of the same, as was the custom in such sales in said county; and that on or about the fifteenth day of November, 1880, the plaintiff, by her agent aforesaid, duly tendered to the defendant, A. Q. McDuffie, master, the cash portion of said purchase-money, and her bond and mortgage for the residue," but that said defendant then refused and still doth refuse to make her a conveyance of said lot of land.

It is also alleged in the complaint that, at the instance of the plaintiff, a rule was issued by the Court of Common Pleas, requiring the master to show cause why he refused to make title to the plaintiff, and that upon hearing the rule and answer thereto, the Circuit judge made a decree, in which, while plainly intimating that, in his opinion, the master ought to make titles, yet stated that it was a matter in the discretion of the master, and he declined to order the master to exercise his discretion, especially as the interests of infants were involved, and a paper had been filed, at the hearing of the rule, by one of the parties interested, guaranteeing that the land bid off by the plaintiff would bring, at a resale, at least \$1,000 more than her bid. He therefore left the master to act as he might be advised, "so that a proper case may be made for the judgment of the court."

The complaint further alleged, that the master had re-advertised the land for sale on the first Monday in January, 1881. Thereupon the plaintiff brought this action, wherein she demands judgment, first, for an injunction restraining the master from selling; second, "that A. Q. McDuffie, master, be required and ordered to fulfill his agreement, and to make a title to the plaintiff" for the said tract of land, "on the plaintiff paying forthwith to him the cash portion of the price at which the said land was bid off, and executing her bond and a mortgage of the land to secure the residue, in accordance with the directions of the said decretal order."

Upon the complaint and an affidavit supporting its material allegations, an *ex parte* order of injunction was made, restraining the master from selling until the further order of the court.

---

November Term, 1882.

---

When the case came up for hearing before the Circuit Court, after the complaint was read, together with the order for injunction and the affidavit upon which it was based, the counsel for defendants made a motion to dismiss the complaint upon two grounds: 1. Because it did not state facts sufficient to constitute a cause of action. 2. Because the court had now no jurisdiction, as the matter had been disposed of by the decree of Judge Aldrich. The counsel for plaintiff opposed the hearing of the motion, upon the ground that no notice of it had been given, and he also insisted that before the motion could be heard the answers should be read; but the Circuit judge declined to hear them, and, after argument, granted the motion to dismiss the complaint upon both the grounds upon which it was based.

Thereupon the plaintiff appealed upon numerous grounds, which, though stated in various forms, practically raise the following questions only: First. Whether notice of the motion to dismiss the complaint, upon the grounds stated, was necessary? Second. Whether it was necessary that the answer should be read before determining the motion? Third. Whether the complaint stated facts sufficient to constitute a cause of action? Fourth. What was the effect of the decree of Judge Aldrich refusing to make the rule against the master absolute?

The first question is disposed of by the case of *Brown v. Buttz*, 15 S. C. 488. This was not a motion preliminary to the hearing of a cause, nor was it a motion to dissolve an injunction, but it was a motion made at the hearing on the merits of the case, and no notice was required. It was, in fact, a demurrer under section 165 of the revised code, which was not waived by a failure to make the objection by a formal demurrer or answer. *Id.*, § 169.

As to the next question, we can see no reason why the answers should have been read. The questions submitted by the motion to dismiss the complaint depended solely upon the allegations contained in the complaint, which, for the purposes of the motion, were to be regarded as true. The answers could not possibly have thrown any light on the questions submitted for the consideration of the court, and were, therefore, wholly irrelevant, and if read could not have been considered. We see no

## Opinion of the Court.

error, therefore, on the part of the Circuit judge in declining to hear the answers.

The next and fundamental inquiry in the case, is whether the complaint stated facts sufficient to constitute a cause of action. We agree entirely with the Circuit judge, that it did not. Conceding every fact stated in the complaint to be absolutely true, we are unable to perceive what cause of action the plaintiff can have. To say nothing of the anomaly of a court entertaining an action against its own officer for declining to execute fully an order of sale made in a cause still pending, wherein his compliance could be enforced by the more summary proceeding by rule and attachment, we do not think that the plaintiff has stated a case entitling her to the relief demanded—specific performance of an agreement for the sale of land—or any other relief.

It is not very clear, from the statements made in the complaint, what agreement she is asking the specific performance of. If it is the agreement arising from the bid made by the plaintiff, at the sale made under the order of the court, then it is very clear that the plaintiff is not entitled to the relief demanded, for, according to her own showing, she did not comply with the terms of that agreement, as fixed by the order of sale, inasmuch as she failed to make the cash payment as required by the terms of that order. If, on the other hand, the agreement she is seeking to enforce is the verbal arrangement made by her agent with the master on the day of sale, then she is not only asking the specific performance of an agreement for the sale of land which was not in writing, but, what is of more consequence, she is seeking to enforce an agreement which the master had no authority whatever to make, for nothing can be clearer than that the master has no power to add to or vary the terms fixed by the court in the order of sale. *Seymour v. Preston*, *Spears Eq.* 481 ; *Baily v. Baily*, 9 *Rich. Eq.* 392.

The case of *Yates v. Gridley*, 16 *S. C.* 496, relied on by the appellant, is not in point. In that case the order of sale required not that a fixed sum should be paid in cash, but so much as might be necessary to pay the costs of the suit ; and it did not appear that the amount necessary for that purpose had been ascertained on the day of sale, and, inasmuch as the clerk after-

---

November Term, 1882.

---

wards received the cash payment without objection and executed the deed, the legitimate inference was that the parties interested had acquiesced in the delay, and, therefore, could not afterwards make such delay a ground for setting aside an executed contract. Again, in *Yates v. Gridley*, the contract was executed, while here it is executory merely, and as is said in *Gasque v. Small*, 2 *Strobh. Eq.* 76: "There is a material difference between a party who seeks to rescind and one who seeks to enforce an agreement, as it requires much stronger evidence to effect the former, than will be sufficient to enable the defendant to resist the latter, and, in applying either of the remedies, an important distinction must be observed between executory and executed contracts. It seems from what is said by all elementary writers on this subject, that the specific performance of agreements is not an absolute right in the party, but a question of sound discretion in the court."

Hence, even if there was no other obstacle in the way of the plaintiff, it is, to say the least, very doubtful whether the court, in the exercise of its discretion, would enforce the performance of this agreement, where the plaintiff has not herself strictly complied with the terms of the sale, and the court is given to understand that if the property is resold it will bring a much larger price, especially as it appears that the interests of minors are involved.

The only remaining inquiry is as to the effect of the proceedings before Judge Aldrich. Under the view already taken this becomes a matter of no practical importance, but we may say that the proceeding by rule was the proper course for the plaintiff to pursue, and when the relief thus sought was denied, her remedy was by appeal and not by another action. The case in which the order of sale was made was still pending, and if any of the parties to that cause, or a purchaser at a sale made under an order in such cause, who thereby became a party to the extent necessary to enable him to move in the cause, conceived that his rights were prejudiced by the non-action of the officer ordered to make the sale, his remedy would be by rule against such officer, and not by another action.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

Opinion of the Court.

---

## McMAKIN v. GOWAN.

1. Plaintiff held a sealed note against the defendant, dated in 1862, and in 1873 he received a certain sum in settlement and surrendered the note. In 1879, more than six years afterwards, plaintiff brought this action against defendant, alleging that the settlement was made by agreement under the scaling act, and that there was an error in the settlement by a stated amount, which was unpaid, and for which he demanded judgment. *Held*, that the action was barred by the statute of limitations.
2. The action was not for equitable relief, and, therefore, governed by section 120 of the code of procedure, but was founded upon a purely legal demand.
3. The action not being founded upon the sealed note, but upon an alleged agreement at which the note was surrendered, the limitation of twenty years did not apply.

Before PRESSLEY, J., Spartanburg, March, 1882.

Action by James McMakin against William Gowan, and after the death of William Gowan revived against his executors. The opinion states the case.

*Messrs. Bobo & Carlisle*, for appellant.

*Messrs. Evins, Simpson & Bomar*, contra.

February 15th, 1883. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The principal question in this case is whether the claim of appellant was barred by the statute of limitations. The presiding judge, Judge Pressley, so held, and also that the laches of appellant was sufficient to bar the action. The appellant excepted to the rulings of his Honor on both the points. The case was heard on the pleadings without testimony from either side.

The action was in substance an action at law for the recovery of money, \$92.76, balance on agreement omitted to be paid by mistake in the calculation. The allegation of the complaint

---

November Term, 1882.

---

was that the defendants' intestate, in November, 1862, had given the plaintiff a sealed note for \$672; that on July 25th, 1873, at the request of defendant, the plaintiff made a calculation of the amount due according to the Corbin scale, which defendant then paid, the amount being \$432.76; that afterwards he found that there was an error in the settlement to the amount of \$92.76, of which the defendant was at once informed, but had refused and neglected to pay the additional sum, and the plaintiff prayed judgment for \$92.76. The defendant denied that there was any mistake as to the settlement, stating that the note had been given in purchase of a slave; that it being doubtful at that time whether such notes were recoverable, the plaintiff, on July 25th, 1873, after some calculation, agreed with defendant to receive in full payment of the note, by way of compromise, the sum which was paid, the plaintiff at the same time surrendering and delivering up to the defendant the note. He further denied that the sum which plaintiff agreed to take, and which the defendant paid, had any reference to the Corbin act whatever, but was proposed and accepted as a definite sum for settlement by way of compromise. He also interposed the statute of limitations and asked a dismissal of the complaint. The presiding judge dismissed the complaint as stated, with costs.

The settlement was made on July 25th, 1873; this action was commenced on September 10th, 1879, something over six years intervening between the two events. It cannot be doubted that if the cause of action is a money demand, founded on contract to pay a certain sum on July 25th, 1873, only a part of which was then paid, leaving a balance due, for which balance the action has been brought, that then the statute is a complete bar. If not, we cannot conceive of a case where it would be. The right of action accrued on July 25th, 1873, and more than six years have elapsed since without any payment or post-acknowledgment, new promise, or anything that would prevent the statute from being interposed.

This seems to be admitted by appellant on the case stated, but the effort is made to construct out of the facts a different case from the one suggested, demanding the application of a different rule as to the statute. First, it is contended that it is not a case



---

Opinion of the Court.

---

at law, but a case in equity for relief, and as to the statute of limitations it is governed by section 120 of the code (first edition), which provides "that actions for relief not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued."

This has some plausibility, but it is without real foundation. The action is not an action to reconstruct the agreement between these parties and to add something to it, which by mistake was left out at the time it was entered into, but it is to recover a certain sum of money which the appellant alleges the defendant contracted to pay, but which by mistake he did not pay. The cause of action is not the mistake, but the breach of promise. This breach is alleged to have occurred through a mistake in the calculation of the amount due. The calculation was not based on a mistaken agreement; it was based on the agreement as understood by the plaintiff, and the mistake occurred simply in the figures.

This can make no difference as to the cause of action. If the agreement required the defendant to pay the full amount now claimed by the appellant, as he contends, and the defendant has failed to do so from any cause, whether inability, perverseness, mistake or otherwise, the plaintiff has a right of action; not, however, on the cause which produced the failure to comply, but upon the failure itself, arising from whatever cause it may. Taking the agreement of the parties, as understood by the appellant, to be the true agreement, what is it? He alleges that the note was to be settled under the scaling act, but in applying this act he made a mistake in the calculation. Admit this; then it would follow that defendant, according to the agreement, was at that time indebted in the sum omitted by this mistake, having paid all but that; not indebted, however, on account of the mistake, but before the mistake occurred, and on the agreement made. The case in its essential elements is nothing more than an ordinary case of breach of contract, remediable by action at law for the recovery of money, to wit, the amount due according to the terms of the contract, after allowing defendant credit for such amount as he may have paid; and such being the case, the limitation act applicable to such cases, must apply.

---

November Term, 1882.

---

It is contended, however, that the original note was a sealed note, and this will prevent the statute. If the action was upon the note, this point would be well taken; but such is not the fact. According to plaintiff's own statement a new contract was made, which, being performed, as plaintiff understood, the note was delivered up and canceled, and now plaintiff has brought his action, not on the old note alleging that it was lost or destroyed and that there is something yet due on it, but upon the new promise alleging that defendant has failed to comply fully with that promise, and he seeks to recover the balance due on the new contract. He cannot now interject the sealed note, but must stand or fall by the cause of action found in his complaint. We think section 113 of the code (first edition) applies, and six years having elapsed from the accrual of the right of action on the cause alleged in the complaint, the action was properly held barred by the presiding judge. It is hardly necessary to discuss the doctrine of laches. We think, however, that Judge Pressley was right, even supposing that this case was an equity case. *Kirksey v. Keith*, 11 Rich. Eq. 33; *White v. Bennett*, 7 Rich. Eq. 260.

The case of *Oakes v. Howell*, 27 How. Pr. 145, relied on by appellant as to the statute, does not apply. There the action was to reform a sealed agreement entered into between the parties, the plaintiff alleging that by the terms of the contract as actually made, annual interest was to be paid, but that this stipulation was left out of the written agreement by "inadvertence, mistake, or oversight," and he sought to reform this agreement in the equity jurisdiction of the court. The court held that the case was within the ten years limitation prescribed by the code (in our code, section 120). But it will be at once seen that the facts and the object of the two actions were widely different, and therefore *Oakes v. Howell* can have no application here.

It is the judgment of this court that the order below be affirmed.

---

Statement of the Case.

---

## BENEDICT, HALL &amp; CO. v. FLANIGAN.

1. Comparison, as an original means of ascertaining the genuineness of handwriting, will not be permitted; but when introduced in aid of doubtful proof, already offered, it may be allowed.
2. Whether the proof is doubtful must be determined, in the first instance, by the trial judge, and his ruling will not be disturbed unless his error be very patent. The direct proof in this case was properly held by the Circuit judge to be doubtful.
3. The rule established in this State does not require the witnesses making the comparison to be professional experts in the matter of handwriting.

---

Before WALLACE, J., Richland, April, 1882.

This was an action by Benedict, Hall & Co. against J. T. Flanigan and others, commenced in March, 1873. Mrs. L. M. Flanigan, one of the defendants, denied her alleged signature, judgment by default being taken against the other defendants. H. R. Flanigan, one of the defendants, and a son of L. M. Flanigan, was called as a witness by plaintiffs, and testified as stated in the opinion. Plaintiffs then called J. H. Sawyer and C. J. Iredell, bank cashiers, and R. S. Desportes, a merchant of long standing, and "a banker in a small way," who testified that from a comparison of the signature to the note with two admitted signatures of L. M. Flanigan, they thought the signature was genuine. This testimony was objected to by the defendant. The judge charged the jury that the only issue before them was the genuineness of L. M. Flanigan's signatures to the three notes. That they, the jury, were to make the comparison of the papers themselves, as well as to consider the testimony of the witnesses who have been examined as experts, and the other testimony in the case; that as we had no professional experts in this State, persons who had experience in the comparison of signatures to notes were competent to testify to the genuineness of signatures in controversy, by comparison with signatures proven to be genuine, and that their testimony was entitled to weight according to their experience and skill in making such

---

November Term, 1882.

---

comparisons; that cashiers of banks, who, in the discharge of duty, had frequent occasion to examine signatures to notes and determine their genuineness, were competent to testify to the genuineness of signatures in controversy by comparison with signatures proven to be genuine, and that their testimony was entitled to weight according to their experience and skill in making such comparisons.

The jury found a verdict for plaintiffs against L. M. Flanigan for \$3,673.97. Defendant appealed.

*Mr. J. H. Rion*, for appellant.

*Messrs. Mellon, Clark & Muller*, contra.

February 15th, 1883. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The exceptions in this case, six in number, though presented in different forms, raise at last but a single question for the consideration of this court, to wit: The question of the competency of the opinion of a witness not a professional expert, as to the genuineness of a signature, derived entirely from comparison—the witness being wholly unacquainted with the handwriting of the party.

The most direct and satisfactory proof of the genuineness of a writing is the testimony of one who was present and saw the writing executed; but this is not always possible, hence the testimony of those who are acquainted with the writing of the party in question, either from having seen him write or otherwise familiar with his acknowledged writing, has invariably been allowed. From a knowledge thus acquired, the witness is supposed to have a standard in his mind, impressed by his memory, with which he can compare the disputed writing and thus reach a correct conclusion. This being the theory upon which such testimony has been uniformly received it is somewhat illogical that comparison on the witness stand of a disputed signature with one acknowledged to be genuine has been as uniformly rejected by most of the courts.

The basis of the first class of testimony being nothing more

## Opinion of the Court.

than a comparison with a standard resting in memory, it would seem that the latter class would be more reliable, resting, as it does, upon a comparison with an acknowledged standard present and in juxtaposition with the disputed writing, especially where the comparison proposed is generally to be made by witnesses of intelligence and familiar with chirography. But, nevertheless, while testimony of the character first above referred to has never been questioned, yet testimony of the latter character has generally been excluded. In England, until the Statute of 28 and 29 Victoria, ch. 18, § 8, the weight of authority was against such testimony. That statute, however, authorized a comparison by the jury and witnesses of a disputed writing with one proved to the satisfaction of the judge to be genuine, and such has been the ruling doctrine in England since. In the American States, the authorities have differed, some holding to the common law decisions and others following the Statute of Victoria.

In our State a medium line has been adopted by our court of last resort. It has been generally accepted here that comparison as an original means of ascertaining the genuineness of handwriting will not be permitted, but when introduced in aid of doubtful proof already offered it may be allowed. We have three decisions upon this subject, from which the rule as just stated may be fairly deduced. The cases of *Boman v. Plunkett*, 2 McC. 518; *Bird v. Millar*, 1 McM. 125, and *Bennett v. Mathewes*, 5 S. C. 478. In the first of these cases a comparison by jury was permitted in aid of doubtful proof. In the second it was permitted to be made by a witness, and the papers were also submitted to the jury, and Judge Evans, in delivering the opinion of the court, said: "Admitting the principle to be correct, that such testimony is inadmissible in the first instance, yet in a case of conflicting evidence this kind of evidence was admitted in the case of *Plunkett* ads. *Boman*, not as original, but as confirmatory evidence, to enable the jury to decide upon which of the witnesses they could most confide. In a practice of many years I have not known the admissibility of this kind of evidence for the purpose stated, questioned."

In the last case, upon the authority of the two first, similar testimony was admitted, the comparison being made by the

---

November Term, 1882.

---

witnesses in the presence of the court in aid of doubtful proof, and in that case the witnesses were not professional experts, one of them being nothing more than a book-keeper in a bank, and the other a notary public. Without discussing further the authorities in other States, we may say that it has been settled with us that such testimony is competent when offered not as original evidence, but in aid of doubtful original proof, or when it is conflicting. Nor does it seem necessary that the comparison shall be made by professional experts alone; others will be permitted, the value of the comparison depending in each case upon the intelligence, skill and experience of the witness in such matters.

But the question arises, Who is to determine when the evidence is so doubtful or conflicting as to admit this supplemental testimony? The presiding judge must, of course, determine this in the first instance. The witnesses are in his presence, and the whole matter is before him, and he must at first decide whether the case is of a character to authorize such testimony. His decision is subject to review by this court, as it is not a question entirely of discretion with him, but the case should be a very strong one and the error of the judge very patent, to warrant this court to overrule this judgment. He is more directly in contact with the question, and with all of its surroundings. The witnesses are examined in his presence, and their manner and bearing subject to his observation, and he is the better able to determine the effect of the testimony. His opinion, therefore, is and should be entitled to much weight.

But, independent of this, we think the facts below sustained the ruling of Judge Wallace. Only one witness was examined directly as to the signature of the defendant, a son of the defendant. He testified in chief that he had seen his mother write, and in his opinion the signatures to the notes were not hers; but he afterwards stated that he would take the signatures to be his mother's without comparing them with the other acknowledged signatures presented to him, to wit, her signature to a guano note and the affidavit on the original answer, but upon comparing them he would deny the signatures on the notes sued on to be hers. This certainly raised a doubt as to the reliability of

---

Syllabus.

---

his testimony. Under such circumstances we think a case was made for the introduction of supplementary testimony. Judge Wallace, in admitting this evidence, properly limited its force and effect by stating that it was entitled to such weight only as the experience and skill of the witnesses making the comparison might demand.

As has already been stated, the rule in this State, as established and illustrated in these cases above referred to, does not seem to require that the witnesses making the comparison shall be professional experts. In *Bennett v. Mathewes*, *supra*, they have no higher qualifications in that respect than the witnesses in this case, and yet they were admitted there, and no question was raised as to that in *Bird v. Millar*. It is true such testimony, as all testimony founded upon opinion merely, is weak and uncertain, and should in every case be weighed with great caution; but the force and effect of such testimony is not before us—we are concerned only with its competency—and we think in this case that Judge Wallace followed the leading of the three cases cited from our own books, and, therefore, his ruling must be sustained.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

---

HUFF v. WATKINS.

1. In action for damages for employing an agricultural laborer in plaintiff's service, the judge erred in charging the jury that "the law required the contract between the laborer and the plaintiff upon which this action is based, to be made in the presence of one or more disinterested witnesses."
2. Section 2081 of the General Statutes does not abolish the common law right of agricultural laborers to contract with an employer, and the relation of master and servant as to such laborers may exist without regard to this statute. *Daniel v. Swearingen*, 6 S. C. 304, recognized and followed.

---

Before PRESSLEY, J., Newberry, February, 1882.

---

November Term, 1882.

---

Action by William T. Huff against William Watkins. The opinion states the case.

*Messrs. Moorman & Simkins*, for appellant.

*Messrs. Suber & Caldwell*, contra.

February 15th, 1883. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The appeal in this case presents but a single point, as will be seen from a brief statement of the facts. The action was brought by the appellant to recover damages alleged to have been incurred because of the fact that defendant had employed a hired agricultural laborer of appellant (one Jordan Butler), after he had been in the employment of appellant some two months of the year for which he was hired, and that after notice thereof the defendant failed to discharge the said Butler. The presiding judge charged the jury "that the law required the contract between Jordan Butler and the plaintiff, to be made in the presence of one or more disinterested witnesses, and there being no testimony to the effect that it was so made, they should find for the defendant." The jury accordingly found for the defendant. The only witnesses offered to prove the contract were the other farm laborers on the place and embraced in the same contract with Jordan Butler. The judge indicated that this testimony might be received, but that it would not avail the plaintiff, as these witnesses were not disinterested.

The appellant excepted and appeals upon the ground: "Because the presiding judge erred in charging the jury that the law required the contract between Jordan Butler and the plaintiff, upon which this action is based, to be made in the presence of one or more disinterested witnesses, and that there being no testimony to the effect that it was so made, they should find for the defendant."

We think the cases of *Huff v. Watkins*, 15 S. C. 87, and *Daniel v. Swearingen*, 6 S. C. 304, are conclusive of this case and against the charge of the presiding judge. In *Huff v. Watkins*, a former appeal in this case, the court held that the relation



---

Opinion of the Court.

---

of master and servant might be created by contract between an employer and an agricultural laborer, though the laborer was to receive a portion of the crop for his services instead of standing wages; in such case the master could maintain an action against one who, with knowledge of the prior contract, employs such servant. The point as to the evidence of the contract was not made or passed upon, the question being simply whether a farm laborer, for a share of the crop, could be regarded as a servant subject to the common law right of action.

In the case of *Daniel v. Swearengen* the same principle was announced, and further, that it was not necessary, under the act of 1869, in reference to contracts with laborers, relied on by respondent here, that the contract should be in writing, nor was a master restricted to the mode of redress prescribed in the act. On the contrary, the court said "that this act did not take away or impair the power to contract by parol, as it existed at common law, or limit the remedies for any violation of the contract to those afforded by the said act." This case is quoted with approval in *Huff v. Watkins*, on that point.

The act of 1869, relied on by the respondent, found now in section 2081 of the General Statutes, provides that all contracts made between owners of land \* \* \* and laborers shall be witnessed by one or more disinterested persons, and, at the request of either party, be duly executed before a trial justice, whose duty it shall be to read and explain the same to the parties, providing in a subsequent section a remedy for the breach of such contract. Now, if this controversy grew out of an effort by the appellant to enforce the remedy prescribed in the act, and with reference to a contract claimed to have been made under it, then we would not say but that it should have been made, either in writing, or witnessed by one or more disinterested witnesses. Neither of these questions are touched in *Huff v. Watkins*, or *Daniel v. Swearengen*, *supra*; the main question in the first being, whether an agricultural laborer for a share in the crop could be regarded as a servant, in the common law sense; and in the second, that question, and also whether, in order to create such a relation, it was necessary that the contract should be in writing, and whether the remedy prescribed by the statute was the only remedy that

---

November Term, 1882.

---

could be resorted to by either party for a violation of the contract. In the first case, as stated, it was held distinctly that such relation could exist as to agricultural laborers for a part of the crop as well as to menial servants, or servants for wages, and in that case the contract, though not in writing and not attested by disinterested witnesses, was the subject of the action. In the latter case, it was held that a contract made under the act even, need not necessarily be in writing, unless required by one of the parties, nor were the parties restricted to the statutory remedy for a breach.

It would seem, then, from these cases, and especially from the case of *Daniel v. Swearengen*, that there may be two classes of contracts in such cases, one under the statute and one at common law, each having its own remedy for a violation—the class under the statute to be in writing, if required by either of the parties, otherwise not, but by the express terms of the statute “to be witnessed by disinterested persons.” It is only in such a contract that the stringent remedy afforded by the act can be invoked, and where the party intends to rely upon this remedy, the contract must be made in accordance with the requirements of the act. But the act does not declare that all other contracts in such cases shall be void. It does not abolish the common law right of parties intending to enter into this relation, to contract, if they so see proper, as they could do in reference to any other matter. It simply gives them the privilege, for their own protection, to come under the act if they choose to do so, thereby becoming entitled to the remedies which the act affords.

This is the principle upon which the case of *Daniel v. Swearengen* was based, for the court said: “But even if a writing was necessary, it was only for the purpose of allowing either of the parties to avail himself of the remedy allowed to such contracts by the twelfth section of the act. Its provisions extend alone to those contracting, and were intended for their protection. The employer was not deprived of any rights he might have against a third person for improperly interfering with those in his service in any way by which it becomes less available to him. But in any view, the provisions referred to

---

Syllabus.

---

do not take away or impair the power to contract by parol, as it existed at common law, or limit the remedies to those afforded by the said section, and the same may be said as to the requirement that it shall be witnessed by disinterested persons. The common law does not require that a contract like this should be witnessed by disinterested persons, nor does the act say that a contract not so witnessed shall be void. It only provides that a contract so witnessed shall be entitled to the remedies prescribed therein."

The second branch of respondent's argument proceeds upon the supposition that if the contract cannot be brought under the act it was void; that Jordan Butler was not bound by it, and that he had the right to leave when he pleased; and such being the case, that no action would accrue to appellant against respondent for employing him. The fundamental fact that Butler was the servant of appellant, being absent, this would be unanswerable if the premise upon which it is based was sound (to wit), that these parties could not contract except under the act, and that the relation of master and servant as to laborers could not exist except by virtue of the act. We think it could, or at least we think it has been so held in *Daniel v. Swearingen*.

As the appellant is not seeking to enforce any remedy afforded by the act, we think it was error in the judge to charge that it was necessary that the contract should be witnessed by one or more disinterested witnesses.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

---

STATE v. PAULK.

1. Where insanity is interposed by defendant as a defense under a plea of not guilty in a criminal prosecution, the defense must be proved by a preponderance of evidence.
2. The mere interposition of such a defense without any evidence to support it, does not require the State to prove its non-existence beyond all reasonable doubt.

---

November Term, 1882.

---

3. Where a criminal act was the immediate result of voluntary intoxication, and committed while it lasted, the intoxication affords no excuse as defense.
  4. Where the State fully proves a *prima facie* case, and a special defense, such as insanity, *alibi*, &c., is interposed, it must be established only by such a preponderance of evidence as will satisfy the jury that the charge is not sustained beyond all reasonable doubt; if not so established, the defendant should be convicted.
- 

Before COTHRAN, J., Union, June, 1882.

This was an indictment against Richard Paulk, a white man, for marrying Dora Brown, a mulatto woman, on April 8th, 1882. The opinion states the case.

*Mr. David Johnson, Jr.*, for appellant.

*Mr. Solicitor Duncan*, contra.

February 15th, 1883. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. The defendant was indicted at the June term of the Court of Sessions, A. D. 1882, for Union county, charged with violating the provisions of the act of Assembly entitled "An act to prevent and punish the intermarrying of races," approved December 12th, 1879. The defendant claimed immunity from conviction and punishment on account of insanity caused by gross and excessive drunkenness.

The portion of the charge which is material to the questions raised in the appeal is as follows: The judge said to the jury: "That the well-established rule upon this subject is, that every man is presumed to be sane, and consequently responsible for his acts, until the contrary is made to appear by satisfactory proof. That where the defense of insanity is interposed it must, in order to avail, be sustained by proof sufficient to bear down and overcome this presumption of sanity. The defendant undertakes to do this, and must do it not beyond a reasonable doubt, but by such preponderance of testimony as to overcome the legal presumption of sanity which attaches to every citizen of sufficient age who has not been adjudged a lunatic. That this

---

Opinion of the Court.

---

question was solely for their determination, and must be decided upon the testimony of the witnesses whom they had seen and heard."

Upon the matter of drunkenness as an excuse for the commission of a crime, they were charged as follows:

"The law makes a distinction between criminal acts which are the immediate result of drunkenness, and committed while it lasts, and acts produced by previous habits of gross intemperance. The former are punishable, the latter not. In other words, the law deals with results and will not punish an insane man. But insanity must exist, and be made to appear by satisfactory proof, to enable him who sets it up as a defense to escape criminal responsibility. It matters not whether that delicate and mysterious organism which we call the mind, and which is supposed to be the seat and center of volition, be destroyed by the acts of the accused or by the touch of the finger of God; if the fact of insanity existed at the time of the commission of the offense, the defendant cannot be legally convicted. But if he has failed with the proof exhibited to overcome the presumption of insanity, and you believe the testimony of the witnesses for the prosecution, he is guilty and ought to be convicted. That upon this issue, as upon every material issue in the case, and upon the whole case, the accused is entitled to the benefit of every reasonable doubt."

The defendant was convicted and sentenced. His counsel, on appeal, relies upon the negative of two propositions laid down in the charge: 1. That when insanity is interposed under a plea of "not guilty" by the defendant in a criminal action, it must be proved by a preponderance of evidence. 2. That when the criminal act was the immediate result of voluntary intoxication, and committed while it lasts, the intoxication affords no excuse as defense. Both of these propositions are denied by the appellant, and error is assigned because they were charged.

The argument of appellant admits the general principle, that as sanity is the normal condition, the law presumes every man to be sane, and judgment will follow, unless the contrary is proved. But it is urged, as if this had been denied to the defendant by the judge, that where insanity is set up as a defense

---

November Term, 1882.

---

and this becomes a question of evidence, the defendant is entitled to the benefit of all reasonable doubts in the mind of the jury on that subject, as well as all others pertaining to his guilt, and, therefore, he excepts to the charge, understanding, as he does, that defendant had been denied the benefit of this principle by the judge.

We think the defendant has misunderstood the meaning and scope of the charge. The judge said, that where the defense of insanity is interposed, it must, in order to avail, be sustained by proof sufficient to bear down and overcome this presumption of sanity. The defendant undertakes to do this, and must do it, not beyond a reasonable doubt, but by such preponderance of testimony as to overcome the legal presumption of sanity which attaches to every citizen of sufficient age who has not been adjudged a lunatic. In civil cases the truth of the facts alleged depends upon the weight or preponderance of the testimony, but in criminal cases, by the humanity of the law, the guilt of the defendant must appear beyond a reasonable doubt, and this applies to all essential elements of the crime.

As we understand the charge, Judge Cothran intended to apply this principle to the defense of the defendant, in the extracts above. He did not hold the defendant to the strict rule of proving beyond all reasonable doubt that he was insane when the act was committed, but he held him simply to the rule which prevails in civil cases, to wit, that he should prove it by the preponderance of testimony, with the view to give the defendant the benefit of all reasonable doubt, as to the facts required to be proved by the prosecution. He held the State bound to prove them to that extent and to the same end; when he came to the defense he relaxed the rule and required only a preponderance, stating distinctly that defendant need not prove his alleged insanity beyond all reasonable doubt; on the contrary, if but the preponderance of testimony was on that side, let the defendant have the benefit of it; concluding his charge with the following direct and unmistakable instruction, "That upon this issue (insanity), as upon every material issue in the case, and upon the whole case, the accused is entitled to the benefit of every reasonable doubt."

---

Opinion of the Court.

---

Thus understood, we think the charge was in accordance with the position taken by appellant, in the line of the authorities cited, and certainly as favorable to the accused as it could have been put. If we have not misapprehended the position of the appellant, he has no cause of complaint as to the first exception, because he was permitted to invoke every reasonable doubt that might exist, which is all that he seems to have claimed or was entitled to demand.

If, however, the position of appellant is, that the defendant having interposed insanity as his defense, the State was bound to prove, beyond all reasonable doubt, that he was not insane—in other words, that the mere interposition of the defense of insanity destroyed the legal presumption of sanity and at once shifted the burden of further proof, as to that question, on to the prosecution, with the responsibility of proving by some additional testimony, beyond all reasonable doubt, that the accused was not insane, and that the judge should have so charged, which from some portion of the argument it would seem that appellant claims—then we would say that such a position has no foundation in any principle or authority that we have been able to discover.

It is true that the State is bound to make out all the essential elements of the crime beyond a reasonable doubt, and until this is done the accused is in no danger, but it would be stretching the doctrine of humanity beyond all precedent to require the State also to prove that the special defense set up by the accused is false beyond all reasonable doubt, in advance of any testimony offered to support it. In a special defense like insanity, the burden of proof rests upon the defendant, and if the defense is sustained not to the extent of a reasonable doubt, but by a preponderance, then the accused becomes entitled to a verdict of not guilty.

With regard to the second proposition, the judge charged: "That the law makes a distinction between criminal acts which are the immediate result of drunkenness and committed while it lasts, and acts produced by previous habits of gross intemperance. The former are punishable, the latter not." That this distinction stated exists, as a general rule, is well settled. 1 *Arch.*

---

November Term, 1882.

---

*Cr. Pl. & Pr., Waterman's Notes* 32, 832. In *People v. Garbutt*, 17 *Mich.* 9, cited by appellant, the court held that voluntary drunkenness of whatever degree constitutes no defense to the commission of crime. In *Smith v. Commonwealth*, 1 *Duvall* 224, also cited by appellant, the same doctrine is held.

In the first case, Judge Cooley states the ground upon which this is held so strongly that I quote his exact language, instead of simply stating the principle. He says: "A doctrine like this, to wit, that drunkenness should excuse, would be a most alarming one to admit in the criminal jurisprudence of the country, and we think that the recorder was right in rejecting it. A man who voluntarily puts himself in condition to have no control of his actions, must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and since it is so often resorted to as a means of nerving the person up to the commission of some desperate act, and is withal so inexcusable in itself, the law has never recognized it as an excuse for crime," citing numerous authorities. 17 *Mich.* 19.

But, Judge Cothran did not charge that voluntary drunkenness would preclude the idea of insanity, and that if the act was committed while the accused was in that condition, he should be convicted whether he was really insane or not; on the contrary, the fair inference from the language used by him, is that he intended that drunkenness in itself without more would not excuse, because he followed his first remark with the emphatic statement that, "It matters not what may have overthrown the volition of the accused, whether it be his own act or the act of God, yet, if the fact of insanity existed at the time of the commission of the offense, the defendant can not be legally convicted." The defendant can take nothing therefore from his exception resting upon the second proposition.

We think the charge as a whole was in accordance with the principles which govern in criminal cases. As is well understood, one of the most important principles in such cases is, that the accused should have the benefit of every reasonable doubt, and this applies to all the facts necessary to his guilt, the act, the intent, and all other essentials, and the State in the first



---

Opinion of the Court.

---

instance must make out its case as to all these, beyond a reasonable doubt. The legal presumption of the innocence of the accused demands this. The State having made a case which in the absence of defense comes up to this requirement, the accused may overthrow it, and this is done when he raises a reasonable doubt as to the facts made by the State, or by proving an *alibi*, insanity, or any other defense inconsistent with guilt. These defenses, however, must have some foundation in the evidence adduced by the defendant, before they can have the effect of either overthrowing the State's case, or raising a reasonable doubt thereto, supposing, as we have, that the State has made a *prima facie* case.

Now the question is, as to the *quantum* of proof required by such defense to have the desired effect; shall it be such as would prove the defense beyond a reasonable doubt? or, may it be done simply by a preponderance of the testimony? Judge Cothran held the latter, and we think he was right. According to the supposition, the prosecution, by proving the act by testimony, and applying the principle of law as to the presumed sanity of the accused, has made out its case in the first instance beyond a reasonable doubt. This must be overthrown by the accused, either by showing the charge entirely false, or by raising a reasonable doubt of its truth, but to do this certainly some testimony is required.

The question is, how much? It is answered, enough to make it reasonably certain, from the preponderance of testimony, that the defense is well founded. If, with such testimony, a case should go to the jury with instructions from the court that after considering the whole testimony, with the legal presumptions that appertained both as to the question of the sanity and the innocence of the accused, they are satisfied that the charge has been proved beyond all reasonable doubt, then to find a verdict of guilty, in our opinion no exception could be sustained on the ground that the State had not been held to the rule of reasonable doubt, or that the defendant had been denied its benefit.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

---

November Term, 1882.

---

## KERCHNER v. GETTYS.

## SAME v. HUCKABEE.

1. Negotiable notes given for a completed purchase of shares of stock in a corporation or joint stock company are based upon a sufficient consideration, the certificates of stock having been delivered to the seller as agent of the purchasers, or else left with him as security for the payment of the notes.
2. These certificates were given to the seller to be delivered to the purchasers when the notes matured or were paid, before which time a steamboat, the only property of the company, was lost to the company. *Held*, that there was no failure of consideration to the notes.
3. *Quere.* Can a purchaser of shares in a corporation, in action for the purchase-money, deny its corporate existence?
4. A corporation chartered by the laws of one State may lawfully do business in another State unless forbidden by its charter, or by the laws of such other State.
5. A corporation chartered by the laws of North Carolina may do business in this State, and may select for its officers citizens of this State.

---

Before WALLACE, J., Kershaw, February, 1882.

Actions by F. W. Kerchner against J. L. Gettys and A. A. Huckabee, heard together. To the statement made in the opinion will be added only the following extract from the agreed case: "The company was chartered under the general law of North Carolina, an abstract of which is furnished. Neither Gettys nor Huckabee ever attended any of the meetings of the stockholders or took any part in the management of the boat. E. Parker was elected president at a meeting of stockholders held in South Carolina, and F. L. Phelps, secretary; both said parties were residents of South Carolina." All of the points considered by the court are raised in the exceptions.

*Messrs. J. T. Hay and Workman & Son*, for appellants.

The company was chartered in North Carolina, but never organized except in South Carolina. It therefore had no legal existence here. 13 *Pet.* 519; 27 *Me.* 509; 1 *Sumn.* 47; 14 *Pet.*

## Opinion of the Court.

129; 1 *Blatchf.* 628; 1 *Black* 286; 4 *Jones Eq.* 231; 26 *Me.* 326; *Field Corp.*, §§ 25, 243; *Moraw Priv. Corp.*, § 535. The notes were not given for any interest in a steamboat, nor could it have been, as the law was not complied with. *Rev. Stat. U. S.*, § 4170. If so, then there has been a failure of consideration. *Blackb. Sales* 199; *Add. Cont.*, §§ 554, 575, 585, 662; 1 *Pars. Cont.* 462. The stock being a nullity, the consideration has failed. 1 *Dan. Neg. Inst.* 177.

*Messrs. W. M. Shannon, W. D. Trantham*, contra, upon the point of the legal existence of the corporation in this State, cited *Moraw Priv. Corp.*, § 502; 13 *Pet.* 519; 101 *U. S.* 356. The defendants are estopped from denying a corporate existence. 14 *Johns.* 238; 16 *Mass.* 94; 6 *N. H.* 164.

February 15th, 1883. The opinion of the court was delivered by

MR. JUSTICE McIVER. These two cases, involving the same questions, were heard, and will be considered together. They were ordinary actions upon promissory notes, and the defenses were failure and want of consideration. By consent they were heard by the Circuit judge, without a jury, upon an agreed statement of facts, substantially as follows:

The Palmetto Steam Boat Company was chartered in 1873 by the State of North Carolina, but not by the State of South Carolina, for the purpose of doing a general freight, passenger and towing business upon the waters of North and South Carolina. The only property owned by the company was a steamboat called "The Lillington," which was purchased and placed upon the Wateree river, in South Carolina, and seems to have been engaged in passenger and freight traffic between the bridge of the W. C. & A. Railroad Company and Parker's Landing, on that river. On May 13th, 1874, the plaintiff, who was the owner of one-half or more of the stock of the company, contracted with Gettys for the sale of four shares, and with Huckabee for the sale of two shares of said stock. These parties accordingly gave their negotiable notes to the plaintiff, dated May 14th, 1874, payable six months after date, the one

---

November Term, 1882.

---

for \$200 and the other for \$100. Thereafter, but at what particular date is not stated, certificates for four shares of said stock were filled out in the name of Gettys, and for two shares in the name of Huckabee, signed by E. Parker, president, and F. L. Phelps, secretary, citizens of South Carolina, and delivered to the plaintiff to be delivered to the defendants when their notes matured or were paid. A short time before the maturity of these notes "The Lillington" partially sank in the Wateree river, with a large cargo of rosin, and the company not being able to pay the expenses incurred in saving the cargo and raising the boat, it was sold under a decree of the United States Court, obtained by one English, who had been employed for that purpose, for an amount insufficient to pay his claim. The Circuit judge held that there was a sufficient consideration to support the notes; that there was no failure of consideration, and that the certificates of stock were delivered to the plaintiff as agent of the defendants, and rendered judgment for the plaintiff in both of the cases.

From these judgments the defendants appeal upon various grounds set out in the record. We do not deem it necessary to make a detailed statement of the grounds of appeal, for we think the only questions in the case are: 1. Whether there was any consideration originally for the notes; and, if so, 2d. Whether such consideration has failed.

The first question depends upon whether there was a completed sale of the stock, for, if so, it can scarcely be doubted that the transfer of shares in a joint stock company constitutes a sufficient consideration to support a note given for the price agreed upon for said shares. There can be no doubt that the defendants contracted to buy from the plaintiff shares of the stock, and actually gave him their *negotiable* notes for the price agreed upon. They had, therefore, done everything required upon their part to complete the purchase. There is as little doubt that the plaintiff procured certificates of stock, to be issued by the proper officers of the company in the names of the defendants, and this operated as a transfer, by him to them, of the property in or title to the stock.

The fact that these certificates were never actually delivered to

---

Opinion of the Court.

---

the defendants personally, cannot affect the question. It does not appear that they ever applied for and were refused possession. On the contrary, the Circuit judge finds as matter of fact (and in a case like this his finding of fact must be regarded as having the same force and effect as the verdict of a jury) that the certificates were delivered to the plaintiff as the agent of the defendants, which, of course, is equivalent to a delivery to them personally. The necessary inference from the fact that the officers of the company made out these certificates in the names of the defendants, and parted with the possession of them by delivering them to the plaintiff, would be that the defendants stood on the books of the company as stockholders, and as such entitled to exercise all the rights belonging to stockholders, and the fact that they never saw fit to claim or exercise their rights as such, cannot have the effect of depriving them of their character as stockholders.

If these certificates were left in the hands of the plaintiff as a security for the payment of the notes, as seems to be the legitimate inference from the conduct of the parties, that would be nothing more, in effect, than a mortgage to secure the payment of said notes, and would, of course, imply ownership of the stock by the defendants. It is scarcely conceivable that defendants would give their negotiable notes for property to which they had acquired no title, and we are, therefore, forced to conclude that the true meaning of the transaction was that the defendants had bought the stock on a credit, and only left the certificates in the hands of the plaintiff as security for the payment of the notes, at maturity, and that upon payment of their notes they will be entitled to demand possession of the certificates of stock. There was, therefore, no want of consideration for the notes.

Our next inquiry is, whether there has been a failure of consideration. The loss of the boat, constituting, as it did, the principal, if not the sole property of the company, cannot operate as a failure of the consideration, for the thing purchased was not the boat, or any undivided interests therein, but shares in the stock of the company, and to these the defendants are still entitled. The stock of a company is a totally different thing from the property owned by the company, and surely it cannot

---

November Term, 1882.

---

be said that because a corporation or joint stock company loses its property by some accident incident to the business in which it is engaged, that the purchaser of shares therein is thereby released from the payment of the price at which he has bought such shares from another stockholder. That is a loss which falls in common upon all the stockholders, and it would be not only without any warrant in law, but grossly inequitable, to throw it upon any one or more of them for the purpose of relieving those who may have bought some of the stock on a credit, and had not paid the purchase-money before the loss occurred. There is not the slightest evidence in this case tending to show that the loss of the property of this company was the result of any fault of the plaintiff; nor is there any evidence that the plaintiff gave any guaranty whatever that the stock should be worth as much at the maturity of the notes as it was at the time they were given. We are, therefore, unable to discover any ground upon which it can be said that there has been a failure of the consideration for which these notes were given.

The fact that the company, in which the defendants bought shares, was a foreign corporation doing business in this State, cannot be allowed to affect the questions raised. Whether the defendants, after recognizing the existence of such corporation by the purchase of shares therein, are now in a condition to question its legality, might well be worth consideration; but aside from this, it is now well settled by the cases cited in respondent's brief, that a corporation created by the laws of one State may lawfully do business in another State, unless forbidden by its charter or by the laws of such other State. *The Bank of Augusta v. Earle*, 13 Pet. 519; *Christian Union v. Yount*, 101 U. S. 352. It is not only not suggested that there was anything in the charter of this company forbidding it from doing business in this State, but, on the contrary, it is expressly stated that it was chartered "for the purpose of doing a general freight, passenger and towing business upon the waters of North and South Carolina." Nor are we aware of any law or public policy of this State either expressly or impliedly prohibiting such a corporation from doing business in this State.

So, too, we see nothing illegal or extraordinary in the fact

---

Syllabus.

---

that the president and secretary of this foreign corporation were citizens of South Carolina. It is a matter of common notoriety that one of the largest and most important corporations in this State now has for its president, and some of its other officers, citizens of the State of New York. In the absence of any prohibition in their charter, the stockholders in a corporation can select whomsoever they may please to manage its affairs, and persons dealing with such corporation have no right to object.

The judgment of this court is that the judgments of the Circuit Court, in the two cases above stated, be affirmed.

---

SUBER v. CHANDLER.

1. A creditor held a sealed note, dated in 1863; in 1869, the debtor made a voluntary deed, to his wife and daughters, of a tract of land. In 1874, action was commenced on the note and judgment obtained in 1879, and a return of *nulla bona* had the same year; on the next day action was instituted to vacate the deed. *Held*, that this latter action was not barred by the statute of limitations.
2. The statute of limitations is inert and inoperative until a right of action arises.
3. A voluntary deed, as against an existing creditor of the grantor, is fraudulent, but no right of action exists in favor of such creditor to have the deed vacated, until he has exhausted his legal remedy by obtaining a return of *nulla bona* on his execution; until then, the statute of limitations does not begin to run in favor of the grantees as against the fraud.
4. This statute runs from the discovery of fraud, only where a right of action also then exists.
5. Delay in suing the note to judgment, short of the time allowed by the statute, does not start the currency of the statute in favor of such a deed.
6. In such cases the Court of Equity will refuse to lend its aid to enable a party to escape from the consequences of a fraudulent act by interposing the bar of the statute of limitations.
7. *McGowan v. Hill*, 16 S. C. 602, overruled.

---

Before PRESSLEY, J., Newberry, February, 1882.

Action by Ivy M. Suber against Dolly L. Chandler, Effa S. Chandler and Fannie T. Chandler. The opinion makes a full statement of the case.

---

November Term, 1882.

---

*Messrs. George S. Mower, Jones & Jones, for appellant.*

*Messrs. Suber & Caldwell, M. A. Carlisle, contra.*

February 15th, 1883. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. In September, 1869, Thomas Chandler, now deceased, in consideration of natural love and affection, executed a conveyance to his wife and two daughters, the defendants, of a certain tract of land situate in Newberry county, containing two hundred and sixty acres, reserving a life-estate to himself. The deed was duly recorded September 11th, 1869. At the time of the execution of this deed, Chandler, the grantor, was indebted to appellant by sealed note, which bore date in 1863. In December, 1874, which was five years and three months after the execution and recording of the deed, the appellant brought action upon his note against Chandler, before the termination of which Chandler died, but the action was revived against his representatives, and judgment was obtained on February 13th, 1879, for \$1,798.07.

In October, thereafter, the sheriff made return of *nulla bona* on the execution issued on this judgment, and on the next day, to wit, October 2d, 1879, the present action was commenced to set aside the deed to the defendants as fraudulent. The defendants, with other defenses not involved on this appeal, interposed the statute of limitations. The presiding judge, Judge Pressley, sustained the plea, and on that ground dismissed the complaint, with costs. The question before us is whether this ruling was error, and this is the only question in the case.

It is a general principle that the statute of limitations does not begin to run until the right of action accrues. This has been long since settled, and is well understood, as an established initial principle in connection with this statute. Mr. Angell says, "that the time is to be computed from the time at which the creditor is authorized to bring his suit. If the contract is to pay money at a future period, or upon the happening of a certain event, the statute, it is very clear, is inoperative until the specified period has elapsed, or the particular event has occurred, or,



## Opinion of the Court.

if upon condition, not until the condition has been performed." *Ang. Lim., ch. XVI., p. 46.* It is also well understood that there are certain disabilities (savings in the statute) which prevent its operation while they exist, one of these being absence from the State of the defendant when the right of action accrues. And it has been held in several cases in our State, that the statute is not set in motion against fraud until the fraud has been discovered. *Egleberger v. Kibler*, 1 *Hill Ch.* \*113; *Farr v. Farr*, *Id.* \*387; *Means v. Feaster*, 4 *S. C.* 249.

All these follow as necessary sequences to the general principle upon which the statute of limitations rests, and which makes it a statute of peace and repose, to wit, unnecessary delay in attempting to enforce a right. Because, when no right of action has accrued, or, if accrued, an insurmountable legal disability stands in the way of asserting it, to permit a party to shield himself by interposing the statute, claiming the benefit of a delay which by no possibility could have been avoided by the plaintiff, would be repugnant to every sense of justice and a reproach to any system of law which claims to be the perfection of reason.

Now, the important questions in this case are, First, When did the right of action accrue? Second, Was the plaintiff, at that time, laboring under any legal disability, and, if so, when was this disability removed? And, finally, was this action commenced within a competent time thereafter? As to the first question, it may be stated as a general proposition, that a right of action accrues the moment a cause of action arises, and not before. Sometimes it may be that this right cannot be exercised at the moment of its accrual, because of some existing disability, applicable either to the plaintiff or the defendant, but, nevertheless, it may exist with its active energy suspended during the pendency of the disability. But the right of action certainly can never accrue before the cause of action arises.

The object and purpose of the present action was to set aside a deed on the ground of fraud upon the appellant. The deed was a voluntary conveyance by the appellant's debtor to the defendants, of a tract of land which, at the date of the deed, belonged to this debtor. It cannot be contended successfully that a voluntary conveyance without consideration, a gift, is

---

November Term, 1882.

---

necessarily fraudulent, although made by one in debt at the time. To give, it is said upon the highest authority, is praiseworthy ; it not only blesses the receiver but the bestower, and there can be no higher enjoyment than the exercise of this right when properly indulged. Generous and benevolent liberality to the objects of one's love and affection, or to promote laudable and praiseworthy purposes, should not only be free from reproach, but be deserving of commendation.

There is, however, a still higher principle than this, a principle of justice, which demands that one shall be just before he is generous ; and this principle, while not discouraging or condemning gifts, will not allow them to stand, if by so doing the just rights of others are defeated. Accordingly, in the harmonious application of these principles, it has been held by our courts, that while a voluntary conveyance of property is not of itself fraudulent even by one in debt, yet, if it was intended to hinder, delay and defeat present creditors, or shall ultimately have that effect, it will be held fraudulent and void.

If at the time of its execution the wrong was intended, the fraud is positive and active, and attaches to the act at that moment. If, however, no wrong was then intended, and the conveyance becomes injurious to creditors afterwards, because at some future time the grantor's property has failed to meet the just demands of the creditors, whose claims existed at the time of the deed, then a passive and legal fraud is developed, which, attaching to the deed, renders it void, not from the beginning, but at that moment. This must be so, because until it is legally ascertained that it requires the property embraced in the deed to respond to the demands of creditors, the rights of the grantee are unassailable. Even the deed of one absolutely insolvent would be good, if he should be so fortunate as to accumulate enough afterwards to meet the claims of creditors in time for their executions. Hence, it has been often held that a creditor, before attempting to assail the conveyance of his debtor, must not simply be apparently unable to secure payment otherwise, but must absolutely fail to do so after exhausting all legal effort to that end, by judicially establishing his debt and having a

## Opinion of the Court.

return of *nulla bona* by the sheriff upon an execution issued thereon.

Now, in such case (which is the case here), the important questions are presented: What is the cause of action, and when does it arise? And, consequently, When does the currency of the statute begin? A cause of action has been held in brief to be a legal right of the plaintiff invaded by the defendant, and it arises when the invasion takes place. Or, as stated by Mr. Angell: "Both in courts of equity as well as in courts of law, a cause of action or suit arises when and as soon as the party has the right to apply to the proper tribunals for relief." Did the appellant have the right, at the date of the deed in controversy, to apply to the courts for relief with the view to have the proceeds of the property therein embraced applied to his debt? He certainly did not, because at that time his debt had not been judicially established, nor was he able to furnish the necessary evidence that his debt could not be paid without the aid of this property. Having no such right at that time, there was no invasion, as a right having no existence cannot be invaded.

All the elements of a cause of action at that time were wanting, and no right of action accrued. So the currency of the statute did not then begin. But the appellant did afterwards reduce his note to judgment, and failed by his execution to find property other than this land to satisfy his debt. Then, and not till then, his right attached to seize this property and make it available, and then, and not till then, did the defendants invade this right by retaining possession and refusing to allow it to be sold. Up to that time their possession was legal and beyond the reach of attack, and it was only at that time that the appellant had the right to apply to the courts for relief, because his right of action had never accrued before.

If, then, the statute of limitations is inert and inoperative until the right of action accrues, as announced in the first general principle laid down in the beginning of this opinion, the time of computation here must begin on October 1st, 1879, the day on which the return of *nulla bona* was entered on appellant's execution. *Jones v. Read*, 1 *Humph.* 345; *Marr v. Ruoker*, *Id.* 347. This action was commenced the next day, to wit, October

---

November Term, 1882.

---

2d, 1879. This was certainly in time to satisfy the demands of any of the statutes, and it will be hardly necessary therefore to discuss the questions whether it required four, six or ten years to bar this action.

But even admitting that the plaintiff's right of action accrued at the date of the deed in 1869, and that the statute of force then requiring only four years is applicable, it cannot be contended that he could then have applied to any court either of law or equity for relief. His hands were completely tied. He was laboring under disabilities far greater than infancy, coverture or absence beyond the seas (the savings in the statute), for such persons have a right to commence their actions, notwithstanding their disabilities, and if commenced the courts will regard them, and grant proper relief. But had appellant commenced his action, it would have been dismissed on the ground that he had no cause of action. It would have been fatal on demurrer because it did not state facts sufficient to constitute a cause of action.

Can it be that, notwithstanding this, the statute was running against him because he was not asserting his right when the doors of all the courts were hermetically sealed in his face, and he was denied the privilege of appealing to them? This would be a stigma too great to be admitted, and a court of equity never ought to permit a defendant to shield himself under such a plea, when surrounded by such circumstances. To legitimate such an effort would be a wrong as great and as repulsive as the fraud which it protects. To prevent this, the court should seize upon the analogies arising from other cases, even though no authority directly in point can be found.

Upon what principle has it been decided that the statute does not commence to run until the discovery of the fraud in cases of active fraud, and that when the plaintiff avers in his complaint that the fraud was not discovered within the four or six years, it devolves upon the defendant to prove the contrary? It is upon the principle that the plaintiff could not have commenced action sooner. He had no knowledge of the wrong. Is not this precisely analogous to the case at bar? The appellant here had no knowledge that the deed to the defendants was in his

i

---

Opinion of the Court.

---

way until he found no other property available by the return of *nulla bona*. He had no cause of complaint, until he found it necessary to make that property available. Upon what principle has it been held, that if the debtor is absent from the State and beyond the reach of the court at the time the right of action accrues, the statute is suspended until he returns? It is because the plaintiff could not have sued sooner. So, too, the statute is suspended for nine months after the death of the debtor. And upon what principle is it that infants, *feme covert*s and parties beyond the seas have been saved in the statute itself? It is because they are not in condition to sue.

This principle, unless authority beyond question the other way can be found, ought to control in a case like this. It is claimed that these principles cannot apply in the face of the positive decision in this State that the statute commences at the discovery of the fraud. This doctrine is not denied, but it must be taken in connection with that other principle, also held in this State, that to give currency to the statute there must be a plaintiff who can sue and a defendant who can be sued. *Bugg v. Summer*, 1 *McM.* 333. The discovery of the fraud by a party who cannot sue on account of it, amounts to no discovery. There are cases where an action can be commenced the moment the fraud is discovered, and to such cases this doctrine is properly applicable, but in those cases where this discovery gives no right of action at the time, the reason of its application entirely fails.

It is conceded that this question has never been distinctly decided in this State, except in the recent case of *McGowan v. Hitt*, to which reference will be had subsequently. In the absence of controlling authority, it does seem that a court, in administering equity, should have some regard to the principles upon which the Court of Equity has always acted, and should decline, in a case like this, to give its aid to a party to escape from the consequences of a fraudulent act, by interposing the bar of the statute. These principles were well expressed in *McLure v. Ashby*, 7 *Rich. Eq.* 430, by Chancellor Johnstone, where he said: "In matters of an equitable nature, the statute not extending to them, this court is not imperatively bound to apply it, and only applies it by analogy to the practice at law, and that

---

November Term, 1882.

---

it does not apply it where a sound conscience would be offended by its application." So, too, as was said by Chancellor Dargan, in the same case, in drawing a distinction as to the statute in courts of law and the Court of Equity: "They are not obligatory upon this court, and do not apply to proceedings in equity, except so far as the court has thought it conducive to the ends of justice to apply them in analogy to the rules which prevail in a court of law. And as the court only acts on this analogy because of its subserviency to the ends of justice, it withholds such action when it would be obviously subversive of equity."

The respondents, while impliedly admitting the correctness of the positions hereinabove, yet contend that in this case they should not apply, for the reason that appellant allowed five years and more to elapse after the execution of the deed which he now assails, before he attempted to put himself in place to attack it. The deed was executed in 1869, and defendant did not bring action upon his note until 1874. We do not see that this fact has any bearing upon the question involved. The appellant's note was under seal, and he had the right to indulge his debtor for five years, or more, if he saw proper, and why should he be punished for this? *non constat* that he knew or had any suspicion that Chandler would not be able to pay it, when demanded, or that the tract of land conveyed to the defendants would have to contribute to that end. There was no law which required that he should hasten proceedings in another and independent matter, in order to create a cause of action against the defendants, and we can see no reason why the five years between the deed and the action on the note, which the appellant, under the law, had a legal right to extend them, should now be converted into a limitation to another action, the right to which has not long since accrued, and which at that time he had no knowledge would ever accrue.

The judgment which we propose to announce is directly in conflict with *McGowan v. Hitt*, 16 S. C. 602. That case was decided by a divided court, Mr. Justice McIver having dissented. It is a very recent decision. Judge Pressley, delivering the opinion of the majority, stated that in several of the States cases were found holding that the statute was suspended in cases

---

Opinion of the Court.

---

like that. See *Jones v. Read*, 1 *Humph.* 345; *Marr v. Rucker*, *Id.* 347, where the court expressly held that the statute did not begin to run until judgment by the creditor, and that some of the court had grave doubts on the question. Under these circumstances, and upon examination, finding that it has no sufficient support, either in principle or authority, in our opinion it should be overruled and it is so ordered.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

---

STATE, EX RELATIONE JONES, v. BOLES.

1. There being some evidence in plaintiff's favor upon the only point made by the pleadings, the Circuit judge erred in granting a non-suit.
2. Section 60 of the sheriff's act of 1839 (11 *Stat.* 38), applies only to judgments upon which no executions have been lodged in the sheriff's office, but where an execution is filed and entered upon the sheriff's books, although not referred to in the index, the sheriff has actual notice or notice sufficient to put him upon the inquiry.

---

Before FRASER, J., Edgefield, October, 1880.

The opinion states the case.

*Mr. J. P. Carroll*, for appellant.

*Mr. J. C. Sheppard*, contra.

February 15th, 1883. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. This action was brought by the relator, Lewis Jones, upon the official bond of Isaac Boles, formerly sheriff of Edgefield county, against the said Isaac Boles and his surviving sureties to the said bond, and the personal representatives of such of his sureties as have died. The substance of the complaint is that the relator, Lewis Jones, in 1868,

---

November Term, 1882.

---

held the oldest judgment against Edward J. Mims; that, under executions to enforce junior judgments against the said Edward J. Mims, his lands were sold, in December of that year, by the said Isaac Boles, as sheriff of Edgefield county, and that the entire proceeds of that sale were wrongfully applied by him towards the satisfaction of said junior judgments, leaving a large balance due upon the judgment of the relator unpaid.

The answer of Isaac Boles denied that he was sheriff of Edgefield county, in December, 1868, but that one John H. McDevitt, having been elected to that office, on November 15th, 1868, demanded and obtained possession of said office, and that thereafter all the funds that went into the said office were received and disbursed by the said John H. McDevitt; that no part of the proceeds of the land sold on sales day in December, 1868, ever came into the hands of the said Boles, but that the same was disbursed by an order of the court, and arranged between the parties interested in the same. And he further denied that the cause or action mentioned in the complaint accrued to the plaintiff within four years before the institution of the same, and the plaintiff's action in that regard was barred by the statute of limitations. The other defendants answered that they knew nothing of the facts, and relied upon the answer of the defendant Boles.

The case was tried before Judge Fraser and a jury. The plaintiff proved the sheriff's bond, and his judgment and execution, that John H. McDevitt did not take possession of the sheriff's office until December 15th, 1868, the entry of the sales, on January 4th, 1869, in the handwriting of Paul, the clerk of Boles, and signed "Isaac Boles, S. E. D." The lands were sold on December 4th, 1868, and Isaac Boles, as sheriff of Edgefield county, executed conveyance to E. A. Mims, on December 6th, 1868, which acknowledges the receipt by Isaac Boles, as sheriff, of the sum of \$8,920, the purchase-money of the lands of the said Edward J. Mims, sold on December 6th, 1868. The execution book of the sheriff contained the following entry: "Lewis Jones, bearer, v. John Lyon, John Leigh, Samuel F. Goode and Edward J. Mims, *Fi. Fa.*, November 12th, 1858." The entry of the execution on the index is as follows: "Lewis Jones,



---

Opinion of the Court.

---

bearer, *v. John Lyon, John Leigh et al.*" In clerk's office the case was referred to in the "abstract of judgments," and also in "the index and cross-index to judgments," as the case of "*Lewis Jones, bearer, v. John Lyon et al.*"

The presiding judge granted a non-suit upon the ground that there was "no proof of actual notice to the defendant, Boles, in accordance with the terms of section 60 of the act of 1839 concerning the office, duties and liabilities of sheriffs, and no proof of any fact affecting the said defendant with the necessary notice."

The plaintiff appealed upon the following grounds:

1. "That the defendant, Isaac Boles, as sheriff of Edgefield district, was bound by law, out of the proceeds of sale made by him of the lands of Edward J. Mims, to satisfy the senior judgment at the suit of the relator, Lewis Jones, against the said Edward J. Mims, which was entered in the execution book in his office, even though it were shown that no actual notice was given him, Boles, of the said judgment before his application of the said proceeds of sale to the payment of the junior judgments against said Mims, and it is respectfully submitted that his Honor erred in ruling otherwise.

2. "That the facts and circumstances, as established by the evidence, furnished reasonable proof that the defendant, Boles, before applying the said proceeds of sale to the junior judgment against Edward J. Mims, had actual notice of the said prior judgment of the relator, Lewis Jones, and it is respectfully submitted that his Honor erred in ruling to the contrary.

3. "That the evidence furnished at the least, presumptive proof that such notice was had by the defendant, Boles, and the determination of that fact ought therefore to have been referred to a jury.

4. "That the defendant, Boles, must be held to have had constructive notice of the aforesaid judgment at the suit of the relator, Jones, because the said judgment was duly recorded in the office of the clerk of said district, now county of Edgefield, and was duly entered in the book of abstract of judgments in said office.

5. "That constructive notice had by the defendant, Boles, of

---

November Term, 1882.

---

the said judgment at the suit of Jones, prior to his, Boles', application of the proceeds of said sale to the aforesaid junior judgments, rendered him liable to the demand of the complaint in this action, and it is respectfully submitted that his Honor erred in ruling to the contrary.

6. "That it is respectfully submitted that his Honor erred in ruling that the notice required by the sixtieth section of the act of 1839, was requisite in the case of the relator, Jones, against Edward J. Mims, when the judgment had been rendered and entered in the clerk's office, and the execution to enforce its payment lodged in the sheriff's office of the district in which the land was sold."

The rule is well settled that if there is no evidence at all to sustain the plaintiff's case, the judge may order a non-suit; but if any such evidence is given, the case must go to the jury. Except the plea of the statute of limitations, the only issue of fact made by the answer, was, whether the defendant, Boles, was sheriff on December 4th, 1868, when the land of Edward J. Mims was sold. Upon this issue, there was proof tending to show that McDevitt did not take possession of the office until December 15th, and that the sale of December 4th was not only made, but the purchase-money received by him, as stated in the deed executed to the purchaser. There was no lack of evidence upon the only point made by the pleadings.

But the judge granted it on another ground, viz., that it was not shown that Boles, the sheriff, had actual notice in accordance with the terms of section 60 of the sheriffs' act of 1839 (11 *Stat.* 38): "The sheriff shall pay over the proceeds of any real estate sold by him to any judgment having a prior lien thereon, which may have been entered in the clerk's office of any district, whether an execution on such judgment may have been lodged in his office or not; provided, notice of such judgment be given to the sheriff before such proceeds shall have been otherwise paid," &c.

The judgments referred to in this section providing for special notice to the sheriff, it seems to us, must be understood as meaning judgments upon which no executions have been issued and lodged in the sheriff's office, including, especially, those rendered

---

Syllabus.

---

in some other judicial district than that in which the sheriff's sale is made. In such cases the sheriff, having no record in his office, it is manifestly proper that he should have actual notice brought home to him. But in this case the execution was lodged in Boles' office and entered in full upon the sheriff's books: "*Lewis Jones, bearer, v. John Lyon, John Leigh, Samuel F. Goode and Edward J. Mims.*" This was actual notice, or, at least, such notice as to put him upon the inquiry. The sheriff is bound to take notice of all records in his office.

The judgment of this court is that the judgment of the Circuit Court be set aside, and the case remanded for a new trial.

---

STATE, EX RELATIONE HAGOOD, v. THOMPSON.

1. Before real estate can become forfeited to the State under our statutes, the following facts must concur: first, the land must appear properly upon the tax duplicate assessed; second, there must be a failure to pay the taxes; third, the land must be exposed to sale under the regulations prescribed for the sale of delinquent lands; and, fourth, there must be a failure to sell for the want of bidders.
2. Under the assessment act of 1878 (16 Stat. 777), the board of assessors are required to assess the value of all real estate, "and certify their assessment back to the said auditor to be entered upon his duplicate." *Held*, that this required the board to certify in writing, and parol evidence by a clerk to the board, that he had made entry of the assessment by their direction upon the taxpayer's return was properly excluded, it not being the best evidence of their action.
3. The auditor's deed for delinquent land is *prima facie* evidence of good title under the express terms of section 116 of the act of 1874 (15 Stat. 772), but there being no such provision in the next succeeding section relating to forfeited lands, the court cannot supply it, and in such case the State must prove its title.

---

Before WALLACE, J., Richland, April, 1882.

Action by the State at the relation of Johnson Hagood as governor, and others constituting the commissioners of the sinking fund, against Ann F. Thompson. The opinion states the case.

---

November Term, 1882.

---

*Mr. J. D. Pope*, for appellant.

*Mr. Wm. H. Lyles*, contra.

February 15th, 1883. The opinion of the court was delivered by

MR. CHIEF JUSTICE SIMPSON. This action was brought by the plaintiffs, appellants, to recover a tract of land which, as commissioners of the sinking fund, they alleged they were entitled to take possession of, because forfeited to the State for non-payment of taxes, having thereby become assets of the State in charge of said sinking fund under the provisions of the act of December 23d, 1879, the second section of which transferred all such lands to said sinking fund commissioners.

Before real estate can become forfeited to the State under our statutes, the following facts must concur: first, the land must appear properly upon the tax duplicate assessed; second, there must be a failure to pay the taxes; third, the land must be exposed to sale under the regulations prescribed for the sale of delinquent lands; and, fourth, there must be a failure to sell for the want of bidders. The first link in the chain is the assessment preliminary to being placed upon the tax duplicate by the auditor. This is regulated by act of assembly, approved December 29th, 1878, entitled "An act to further provide for the assessment of real estate for the purposes of taxation." 16 Stat. 777.

That act provides that the county auditors in the several counties shall, before the time fixed for the assessment of property, appoint for each township a board of assessors consisting of three intelligent freeholders, who, after organizing by the election of a chairman and taking the necessary oaths, shall constitute a board of assessors for the purpose of assessing the value of real estate in their township for the purposes of taxation. The third section of this act provides: "That before entering the value of any real estate upon his duplicate, the county auditor shall submit a description of the same to the board of assessors appointed as aforesaid, \* \* \* and the said board shall thereupon, without delay, assess the value of the same, and certify their

## Opinion of the Court.

assessment back to the said auditor to be entered upon his duplicate."

The main question in this case arises under this act. The plaintiffs, without producing a certificate from the board of assessors that the property in question had been assessed by them, and by the authority of which the auditor had placed the land upon his tax duplicate, proposed to prove by Joseph Muller that he acted as clerk of the board of assessors, that the board of assessors assembled in the auditor's office in 1879, that the description of the property of the defendant was put before this board in the shape of an original return taken by the auditor, with the column for valuation left blank, that the valuation was then entered therein by the witness, in his handwriting, but by the direction of the assessors; and that the paper so filled up by the witness was turned over to the auditor, who filed the same away, transferring the value so assessed to the duplicate lists. This testimony was objected to by defendant upon the ground that the valuation could be fixed alone by the board of assessors, and that the action of the board could not be proved by parol. The presiding judge sustained the objection and ruled the testimony inadmissible.

It was then urged by the plaintiffs that as, under the 116th section of the tax act of March, 1874, the deed of the county auditor for any real estate sold at delinquent land sale shall be *prima facie* evidence of a good title, so under the 117th section of the same act, where the land became forfeited to the State, the forfeiture carried with it a *prima facie* title to the State. As to this, the presiding judge held that as the words *prima facie*, which were found in section 116, as to the deed of the auditor for delinquent lands sold by him, did not appear in section 117 where forfeiture to the State took place, he could not supply them by construction. He therefore overruled the position of the plaintiffs, holding that the *onus probandi* rested with the State to establish a good title.

The plaintiffs, therefore, determined to take a non-suit, with leave to set the same aside if so advised, which was ordered on motion of plaintiffs' attorneys. The plaintiffs then appealed

---

November Term, 1882.

---

upon two grounds. First. "Because his Honor erred in holding that the assessment of defendant's property for taxation could only be proved by a written certificate signed by the assessors to comply with the provisions of the act of December 24th, 1878." Second. "Because his Honor erred in holding that while under the one hundred and sixteenth section of the act of 1874, the auditor's deed to the purchaser of real estate purchased at a delinquent land sale, shall be *prima facie* evidence of good title to the grantee, the same rule would not apply under the one hundred and seventeenth section of the same act, where the title passed to the State for the want of bidders at such sale."

We concur with the presiding judge, that the testimony of Muller was inadmissible. The act of 1878, *supra*, expressly provides that the assessment for taxation shall be made by the board of assessors, and that this board shall certify their assessment back to the auditor to be entered upon his duplicate. It not only directs the assessment to be made, but it specifies the mode by which that assessment is to be authenticated, upon which authentication the assessment is to be placed upon the tax duplicate, to wit, the certificate of the board. It was necessary, therefore, in this case for the plaintiffs to prove, as the first link in their chain of title, that the land in dispute had gone upon the tax duplicate in accordance with the regulations prescribed by the act. This they attempted to do by the introduction of Muller.

It is a general rule of evidence that the best evidence of which the fact in issue is susceptible must be offered to prove it. In the unavoidable absence of this, secondary evidence may be resorted to. The question here was, Had the board of assessors made and certified an assessment upon the real estate of the defendant so as to authorize the county auditor to place it upon the duplicate for taxation? Muller did not propose to prove that the board of assessors had certified their assessment back to the auditor as required by the act, but simply that he, as their clerk, had entered a valuation upon the original return, which paper had been handed to the auditor and by him filed away.

Inasmuch as the act of 1878 made the certificate of the

---

Opinion of the Court.

---

board a part of its duty in the assessment as authority for the auditor to enter the valuation upon his duplicate, the fact of that certificate was a necessary fact in the case, and under the general rule requiring the best evidence of which it was susceptible, the certificate itself should have been produced, or, if lost or destroyed, then secondary evidence of its existence and contents would have been admissible. As has already been said, the witness Muller was not offered to prove an assessment of the board authenticated by its certificate, or the contents of such certificate as a lost paper, but he was offered as an eye-witness to the proceeding of the board to prove its action. This, we think with the presiding judge, was incompetent. The board under the act is an organized body consisting of three members with a chairman. They are required by the terms of the act under which they are constituted to certify their assessments, and the best evidence of their action in this respect is their certificate made in some form in writing attesting their action as an organized body. *Dent v. Bryce*, 16 S. C. 1; *People v. S. F. Union*, 31 Cal. 132; *Blackw. Tax T.* 113. The testimony offered was foreign to this point. It was an effort to prove an assessment in a mode different from that prescribed by the act, and was properly excluded.

As to the second point, we also concur with the presiding judge. The General Assembly in its wisdom saw proper to make the deed of the auditor *prima facie* evidence of title as to delinquent lands sold by him in express terms as found in the one hundred and sixteenth section of the act of 1874. They also saw proper to leave those words out in the one hundred and seventeenth section, where the land was forfeited to the State for the want of bidders. We have the power to construe and interpret doubtful and analogous phrases or words in an instrument brought before us, so as to reach its true intent and meaning, but we have no power to interpolate or insert words not used; especially should we be restrained in a case like this, where the words in question are expressly incorporated in the one section and left out in the other. We must suppose that the legislature intended, for some good and sufficient reason, that the purchasers at delinquent land sales should stand *prima facie*

---

November Term, 1882.

---

upon the deed of the auditor, while in the case of the stringent doctrine of forfeiture it was the intention that the State should be required to make out its case.

It is the judgment of this court that the order below be affirmed.

---

## SAWYER, WALLACE &amp; CO. v. MACAULAY.

1. To permit this court to consider alleged errors of the Circuit judge in omissions to charge, it is absolutely necessary that the "Case" should show that he was requested so to charge.
  2. The "Case" is the source of information for this court, and alleged errors which are not there disclosed cannot be considered.
  3. Under the law of North Carolina, which makes an endorser a surety, unless it be otherwise clearly expressed, an endorsement for collection only, without change of ownership, does not make such endorsers co-sureties with their prior endorser for value.
  4. It is too sweeping a proposition that notes are illegal if they "arose directly or indirectly out of transactions in futures," and the Circuit judge committed no error in refusing so to charge.
  5. Where the brief does not give the judge's charge to the jury, a detached fragment of the charge separated from its context cannot be held by this court to be erroneous.
  6. Action on a note executed and payable in North Carolina is not barred in this State within the six years here allowed, although the limitation of actions as there prescribed is for a shorter period. The statute of limitations is applied according to the *lex fori*.
  7. Ownership of a note alleged in the complaint and admitted in the answer, could not at the trial be questioned upon proof of an endorsement by plaintiffs to their attorneys for collection.
- 

Before COTHRAN, J., March, 1882.

Action commenced February 5th, 1881. The opinion states the case.

*Mr. S. P. Hamilton*, for appellant.

*Mr. T. C. Gaston*, contra.

February 16th, 1883. The opinion of the court was delivered by



---

Opinion of the Court.

---

MR. CHIEF JUSTICE SIMPSON. This was an action on three notes executed by Stenhouse, Macaulay & Co., merchants doing business in Charlotte, N. C. The first was executed on July 28th, 1876, to the plaintiffs and payable at Merchants and Farmers National Bank, Charlotte, eighteen months after date. The second was dated October 24th, 1877, executed by the same parties and payable at the same bank, and the third bore date October 25th, 1877, executed by same parties and payable at same bank. All three of the notes were endorsed by the defendant by simply placing his name, "D. Macaulay," on the back of each. Each note also had the following endorsement by the plaintiffs: "Pay to J. H. McAden, president, or order. Sawyer, Wallace & Co." This endorsement, at the trial, had on each been canceled by pen marks drawn through them; also on each was found at the trial, "Pay Patterson & Gaston, or order, for collection. Sawyer, Wallace & Co." Patterson & Gaston were the attorneys who brought the action in the name of the plaintiffs.

At the close of plaintiffs' testimony, the defendant moved for a non-suit on the ground that, it appearing that the notes had been endorsed to Patterson & Gaston, the plaintiffs were not entitled to sue. The judge refused this motion, holding that plaintiffs having alleged ownership in their complaint, and this not being denied in the answer, the ownership must be taken as admitted. The verdict was for the plaintiffs, the amount of the notes, to wit, \$1,720.62.

The defendant is now before this court upon six exceptions, four of which assign error in the refusal of the judge to charge certain propositions; the fifth, because his Honor did not allow J. E. Stenhouse, one of the firm, to testify as to the character and business of buying and selling futures and the custom of trade in connection with such transactions generally, and the sixth, because his Honor erred in not deciding that the note for \$645.10 (the first note mentioned), being barred in North Carolina before the commencement of this action, the plaintiffs could not recover; and, also, in arrest of judgment, because the three notes being endorsed by Sawyer, Wallace & Co., the plaintiffs,

---

November Term, 1882.

---

to Patterson & Gaston, for collection, the plaintiffs could not maintain an action in their own names as owners and holders.

As to the first four and sixth exceptions, which involve errors of omission to charge, we do not find anywhere in the "Case" or "Brief" that the questions there raised were brought to the attention of the judge by request to charge. This, under our decisions, was absolutely necessary so as to permit this court to consider them, and especially does it become the duty of the court to deny consideration when the objection is interposed by the respondent claiming his legal rights. In *Madsden v. Phoenix Fire Ins. Co.*, 1 S. C. 29, Mr. Justice Willard said: "The third ground of appeal is insufficient so far as it is based upon the failure of the judge to charge certain propositions therein set forth for want of a request to charge, as was the case in reference to the second ground. If counsel desire to bring any view of the law of a case to the attention of the jury, they must make such view the subject of a request to charge, and, failing in this, they cannot allege error. The maintenance of this rule is essential to a correct and careful administration of justice when the appellate court is limited to a consideration of exceptions on points of law, and cannot look into the whole case to see that substantial justice has been done between the parties."

In *Abrahams v. Kelly and Barrett*, 2 S. C. 238, the same justice, speaking for the court, said: "It does not appear that the second proposition was brought to the notice of the Circuit judge at the trial. It was not touched upon in the charge, nor was there any request to charge made in respect to it. The presiding judge is not bound to submit any particular proposition of law unless his attention is called to it and a request made to that effect. However important to the case such a proposition may be, error cannot be alleged unless, after request, he has refused to submit it. Nor is a misstatement of the law error unless his attention is called to it and he neglects or refuses to correct it. It is the office of exceptions to bring before this court only such matters of law as were the subject of contest upon the trial."

In *Fox v. Railroad Co.*, 4 S. C. 543, it was held that a failure

## Opinion of the Court.

to charge a particular proposition of law could not be assigned as error unless the judge on request declines so to charge, and the court said, when such an objection is insisted upon on behalf of the respondent, the court must necessarily regard it.

The same principle was held and enforced in the late case of *Sullivan v. Jones*, 14 S. C. 365, where Mr. Justice McIver said: "All of these grounds except the first, second and third complain of omission to charge upon points which, so far as the 'Case' discloses, were not brought to the attention of the judge during the trial, either by request to charge or otherwise, and therefore are not properly before us."

Neither do we find anything in the "Case" to sustain the fifth exception. If the presiding judge limited or curtailed J. E. Stenhouse "in his testimony as to the character and business of buying and selling futures, or the custom of trade in connection with such transactions generally," the "Case" submitted fails to show it and it is not admitted by respondent. In fact it is denied in respondent's argument. The only statement we have is found in the exception raising the question. This the court cannot regard. The "Case" is the source of our information as to what occurred below; its very object is to inform the court authoritatively of the legal questions contested below, and of the facts pertaining thereto. This court has held that as to these matters it confines itself to the "Case." *Sheriff v. Welborn*, 14 S. C. 480. And it cannot consider statements in exceptions not found in the "Case." The defects in an appeal herein are fatal, especially where the respondent not only fails to admit the statements in exceptions, but denies their existence and demands the legal consequences applicable.

The court, however, could not but regret that an appeal should terminate in this way if there was merit therein which, if otherwise presented and in accordance with the rules in such cases, might have been successful. We have therefore, *ex gratia*, considered the exceptions so far as to be satisfied that no injustice will be done, or the rights of parties lost or defeated by enforcing the principles which the cases cited require.

The first two exceptions complain that the presiding judge failed to charge that under the law of North Carolina, where

---

November Term, 1882.

---

the notes were executed, D. Macaulay, the defendant, and Sawyer, Wallace & Co. were joint sureties by virtue of the endorsements made respectively on said notes, and therefore no action could be sustained by the plaintiffs against defendant, except for his aliquot portion of the amount paid by plaintiffs. The statute of North Carolina referred to, provides that "whenever any bill or negotiable bond or promissory note shall be endorsed, such endorsement, unless it shall be otherwise plainly expressed therein, shall render the endorser liable as surety to any holder of such bill, bond or promissory note, and no demand on the maker shall be necessary previous to an action against the endorser; provided, that nothing herein shall in any respect apply to bills of exchange, inland or foreign." The character of the endorsements by these parties has already been stated. The endorsement of the defendant was his name on the back without more; that of the plaintiffs was a direction to pay the president of the bank at which the notes were made payable, which was afterwards canceled.

While no doubt the act above referred to made the defendant a surety to the makers, dispensing with notice of demand, we do not think it had this effect upon the plaintiffs. The character of their endorsement excludes this idea, and, in the language of the act, "otherwise plainly expresses" its purpose. The notes were payable at the bank of which McAden was president, and the object of the plaintiffs' endorsement was to enable Mr. McAden to collect them. There was no evidence that they were discounted by the bank, or that the ownership was ever changed. It would have been error therefore for the judge to have charged as suggested.

The third exception assigns error, "because his Honor refused to charge that if the jury believes the cause of the losses which are the consideration of the notes, arose directly or indirectly from the transactions in futures, such transactions are illegal and the plaintiffs cannot recover, and that he did charge that contracts in futures, so called, may be legitimate." Even upon the assumption that contracts in what are known in commercial circles as "futures" are illegal, as gambling transactions or against public policy, or violative of the North Carolina act of

---

Opinion of the Court.

---

1788, yet the judge could not have legally charged in the broad terms indicated in this exception, that if the notes arose "directly or indirectly," &c. This would cover any and all connection, the most immediate as well as the most remote, the guilty as well as the innocent. This would have been too sweeping.

As to the latter part of this exception, "that the judge did charge, that contracts in futures, so called, may be legitimate," we do not know in what connection this was said. The charge of the judge is not set out in the case, either in whole or in part, and in the absence of explanation or connection, and all information as to its application, it would be unjust to the Circuit judge for this court to attempt to pass upon a detached fragment of his charge like this. Besides, the necessary information is not before us. We do not intend, however, to intimate that contracts based on the sale or purchase of futures, would be legal. But we do not think that this distinct question has been sufficiently raised in this case to authorize us to consider it, and therefore it has not been adjudged.

The fourth exception involves a question of fact, to wit, the force and effect of testimony, which was a matter for the jury and not the judge.

As to the fifth, as has been stated, we are not informed of the precise ruling of the judge upon this subject; nor does the "Case" show what connection a general history "of the character and business of buying and selling futures, and the custom of trade in connection with such transactions," had with the case at bar. The object of testimony is to evolve facts pertinent to the issue in contest, and within the knowledge of the witness as applicable thereto. How far the general business of buying futures was involved in this case, we can not tell, and, if involved, whether Mr. Stenhouse was a sufficient expert to be authorized to speak generally upon the subject, we are not informed. We must leave this exception, therefore, as we find it. Any special fact bearing on the case and within the knowledge of Mr. Stenhouse, he was competent to prove, but testimony by him on the subject of futures and the usage and custom of trade therein "generally," it appears to us would have been irrelevant.

---

November Term, 1882.

---

Sixth. "Because his Honor erred in not deciding that the note for \$645.10, being barred in the statutes of North Carolina before the commencement of this action, the plaintiffs could not recover on the third cause of action." Even if the proposition of law contained in this exception was correct, yet the judge before charging it was required to assume that the facts upon which it rested had been proved. This he could not do, as the facts are alone for the jury. But is the proposition a sound one? In *Levy v. Boas*, 2 *Bail.* 217, the court held generally, that the limitation of actions is of the *lex fori*, not of the *lex loci contractus*, and in that case where the debt had not been barred in Pennsylvania, the place of the contract, yet in this State where the period of limitation was shorter, that period having elapsed, it was held barred. We can see no reason, where the facts are reversed, why the same rule should not prevail. The underlying principle is that the *lex fori* shall govern as to the remedy and its enforcement, and if in either case the *lex fori* is invoked, the same principle should control.

If the statute paid or destroyed the debt, then when once barred in any State, it would be gone forever and in all places; but this is not the theory of the statute of limitations. It does not pay the debt; it only suspends the remedy. This may take place in one State, while in another the active energy of the remedy may not be impaired in the least. The case of *Morton & Co. v. Naylor*, 1 *Hill* 439, does not touch the question. There the point was as to the effect of a judgment in another State, whether it could be regarded in this State as a debt of record, and, like judgments here, not subject to the plea of the statute. The court held that it would rank here in that respect as in the State where obtained, and if the statute could not be pleaded there it could not here.

Mr. Angell on Limitations, page 69, section 65, says: "Equally well settled is the doctrine that remedies on contracts are to be regarded and pursued according to the law of the place where the action is instituted, and not by the law of the place where the contract is made." He states further that upon the question being made before Lord Ellenborough, in *Williams v.*

## Opinion of the Court.

*Jones*, 13 *East* 439, that learned jurist said: "It is said that parties who have contracted abroad return to this country with the same rights only which they had in the country where they are contracted, and, generally speaking, that is so—that is, if the rights of the contracting parties be extinguished by the foreign law by the happening of certain events. But here there is only an extinction of the remedy in the foreign court according to the law stated to be received there, but no extinction of the right; and there is no law or authority that where there is an extinction of the remedy only in the foreign court, that shall operate by comity as an extinction of the remedy here also. If it go to the extinction of the right itself, the case may be different."

Mr. Justice Story, in *Leroy v. Crowninshield*, 2 *Mason* 151, stated the inclination of his mind to be the other way, on the supposition that where the debt was barred by the *lex loci*, this amounted to a virtual extinction of the right in that place, which ought to be recognized in every other tribunal as of equal validity; but this learned judge admitted that the current of authority was too strong against him to be resisted. In *Townsend v. Jemison*, 9 *How.* 407, found cited in a note to Angell, page 76, the question underwent thorough examination, with the inclination of Judge Story's mind above referred to before the court, and pressed upon it, the direct question being, whether the cause of action having accrued in Mississippi and been completely barred there, the bar of the Mississippi statute might not be pleaded in a court of Louisiana. The court said: "The rule in the courts of the United States in respect to pleas of the statute of limitations has always been that they strictly affect the remedy and not the merits." See, also, *McElmoyle v. Cohen*, 13 *Pet.* 312. Under these authorities it would have been error for the Circuit judge to have charged as suggested in this exception.

As to the matter relied on in arrest of judgment, we are satisfied with the reasoning of the Circuit judge when he refused the motion of non-suit made on the same ground at the trial. The ownership of the note was a question of fact; this was alleged in the complaint to be in the plaintiffs and not denied in the

---

November Term, 1882.

---

answer; this, we think, was sufficient, and could not be overthrown by the qualified endorsement to the attorneys for collection.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

---

## GILMORE v. ROBERTS.

1. Under the former system of pleadings, a party not in the actual occupation of land trespassed upon, but having title and in possession of a part of the same tract, or having made entry thereon, might maintain action of trespass *quare clausum fregit* against a trespasser in possession of the portion upon which the trespass was committed; and since the adoption of the code of procedure, a party having title to property may recover damages for a trespass upon it without regard to the possession.
  2. An order refusing a motion for non-suit not disturbed, there having been some evidence against defendant, and the jury having found for plaintiff.
- 

Before WITHERSPOON, J., Richland, July, 1882.

This was an action by E. D. Gilmore against Wm. T. Roberts and J. C. Shirar, commenced February 28th, 1882. The charge of the judge to the jury and the opinion of this court constitute a full statement of the case. The charge was as follows:

The plaintiff must recover either on his possession or on his title. If he is not in possession at the time of the alleged trespass, he must show a legal title to the land to enable him to recover. But if by metes and bounds he has possession of a large tract of land to which he has a legal title, and any one obtrudes upon a part of that tract, such obtruder is properly sued in this form of action. If the plaintiff here has a legal title to the whole tract of land with actual entry, he may maintain the action of trespass *quare clausum fregit*, as it was formerly called, against any one who obtrudes himself into the actual possession of a part of the land. The facts are for the jury. What do these facts prove? Have these defendants made themselves



---

Opinion of the Court.

---

liable under the law as laid down? Has the plaintiff satisfied the jury that the land in dispute is a part of the larger tract to all of which he has legal title? That is the question to be solved. If the jury find for the plaintiff, he is entitled to some damages. If the jury believe that the plaintiff was not in possession, as explained by the law already cited, and had not a good legal title to the land in dispute as that law requires, their verdict must be for the defendants. Gilmore's title as a good legal title to the Mill tract is admitted. Is this a part of that tract?

Thereupon the jury rendered the following verdict: "We find for the plaintiff, and one dollar damages."

*Mr. W. S. Monteith*, for appellants.

*Mr. Andrew Crawford*, contra.

February 28th, 1883. The opinion of the court was delivered by

MR. JUSTICE McIVER. This was an action to recover damages for a trespass on the lands of the plaintiff. It was conceded that the plaintiff had the title to a tract of land known as the Patterson Mill tract, and the principal contest below seems to have been as to the true location of the lines of that tract, whether they embraced the land where the trespass was alleged to have been committed. The jury, under a charge from the Circuit judge, to which no exception was taken, found for the plaintiff, and the defendants appeal upon three grounds, but as the third has been abandoned it need not be stated here. The remaining grounds of appeal are as follows: First. "Because his Honor erred when he refused to charge the jury at the request of the defendants, as follows: If the jury believe that Shirar, defendant, is in possession of the land in dispute, either himself, or by his tenant Mims, the plaintiff cannot recover in this form of action, and the verdict must be for the defendants. Second. Because his Honor erred in refusing the motion for non-suit as to the defendant, William T. Roberts."

We do not think there was any error in refusing the request as submitted. While it may have been true formerly, when it

---

November Term, 1882.

---

was necessary to preserve the distinctions between the different forms of action, that the action of trespass *quare clausum fregit* could not have been maintained against a defendant in possession of the land upon which the alleged trespass was committed where the plaintiff, though having title, was not in the actual occupation of the land and had not made entry thereon, yet it never was true that the simple fact that the defendant was in possession was sufficient to deprive the plaintiff, who had title, of his right to bring this form of action, because if he too had actual possession of a part of the tract his title would draw to it possession of the whole, and he could maintain the action, or if he had made entry thereon the same result would follow. *Grimke v. Brandon*, 1 N. & McC. 356; *Amick v. Frazier*, Dud. 341; *Pearson v. Dansby*, 2 Hill 466; *McColman v. Wilkes*, 3 Strob. 465; *Cleveland v. Jones*, Id. 479; *Watson v. Hill*, 1 Strob. 78.

The case of *Vance v. Beatty*, 4 Rich. 104, relied on by the appellants, does not conflict with these views, but on the contrary it expressly recognizes the authority of some of the cases above cited, and simply decides that where the plaintiff has title but has never had any actual possession, the constructive possession derived from his title is not sufficient to enable him to maintain the action of trespass *quare clausum fregit* against one who is in actual possession.

It would have been error, therefore, to have charged the jury in the unqualified form demanded by the defendants' request, especially where, as in this case, there was direct testimony that the plaintiff had been in the actual occupation of the land for many years, by his tenants, and had been in the continuous use of it, holding it adversely, as he said, ever since he bought it in 1860, until these defendants, in 1879, intruded themselves into the possession of a part of it. The Circuit judge seems to have been aware of the distinction indicated, for he framed his charge in conformity to it. So that even under the law as it stood prior to the adoption of the code of procedure, the request in its unqualified form was properly refused, for if the plaintiff was in the actual possession of a part of the land, having title to the whole, at the time the defendants intruded upon him, the

---

Opinion of the Court.

---

action could have been maintained, even under the former practice, although the defendants might have been in the actual possession of that portion where the trespasses were committed, at the time the action was commenced.

But since the distinction between the various forms of action has been abolished, it may well be questioned whether there would be any foundation for the proposition contained in the request to charge, even if qualified, as we have suggested. If a plaintiff has title to a piece of property, whether real or personal, and also shows that another has trespassed upon it, by any unlawful use of or interference with it, we see no reason why he should not now be permitted to recover damages for such trespass. The wrong done is to the property of the plaintiff, and whether that property is, at the time, in his possession, or has been seized upon by a trespasser, would seem to be a matter of small consequence, so far as the substantial rights of the parties are concerned. While, therefore, under the former system of pleading, there may have been good reason why the distinctions between the different forms of action should have been rigidly observed, and the action of trespass *quare clausum fregit*, which was designed to afford redress for damages to the possession, should have been confined to cases where his possession was intruded upon, we see no reason now for observing any such distinction, and, therefore, where a plaintiff shows that his legal rights have been invaded, he ought to be entitled to redress from the wrongdoer, in the only form of action which he is now permitted to bring. We do not see, therefore, how, in any view of the case, the first ground of appeal can be sustained.

As to the second ground of appeal, which complains of error in refusing the motion for a non-suit as to the defendant Roberts, we are at a loss to discover upon what ground the non-suit was claimed. None is stated in the "Case," and none is suggested in appellants' argument. If we are left to presume that it was because there was no evidence connecting Roberts with the alleged trespasses, we can only say, as was said by O'Neill, J., in *Watson v. Hill*, *supra*: "Whatever might have been the doubt before, after the jury have held that the evidence satisfied them that the defendant committed the trespass, there can surely

---

November Term, 1882.

---

be no room to say that the judge below ought to have ordered a non-suit." But in addition to this the plaintiff distinctly testified to the trespasses by both of the defendants, for he said, in speaking of the land, "Shirar and Roberts trespassed upon it, as I have stated, in 1879," and this, of course, was sufficient to go to the jury.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

BRATTON v. MASSEY.

1. On appeal from a Circuit decree overruling a demurrer, with costs to be paid out of certain proceeds of sale, this decree was reversed and the complaint dismissed. *Held*, that the direction for the payment of costs fell with the decree, although not mentioned in the exceptions nor in the opinion of this court.
2. Costs in equity causes, after the act of February 20th, 1880, (17 Stat. 303,) were governed by the former practice under rule 72 of the Circuit Courts, and, therefore, followed the event of the suit, if not otherwise ordered in the judgment.
3. Costs being in the discretion of the Circuit judge, his direction concerning them will not ordinarily be disturbed, and in this case is approved.

---

Before COTHRAN, J., Chester, April, 1882.

Action by John S. Bratton against B. H. Massey et al., commenced in August, 1879, heard by Kershaw, J., in June, 1880; an appeal from his decree was heard by this court, November term, 1880. See 15 S. C. 277. The opinion states the case.

The decree from which this appeal was taken, was as follows:

At common law, costs were not given either to plaintiffs or defendants. But as a matter of statutory regulation (and it is purely such), it is of great antiquity. For a time, beginning with 6 *Edward I.*, costs were allowed only to plaintiffs succeeding, or "demandants," as the parties were styled in the statutes.

---

Circuit Decree.

---

Afterwards by the Statute of Marlbridge, in the time of Henry III. they were allowed to the defendant prevailing; and so to this day. When one brings his action and succeeds, it is difficult to perceive upon what grounds of justice or equity the party sued and who is obviously in default, should be relieved from the payment to the prevailing party of the expenses of the suit, by what name soever such expenses should be denominated. Upon the other hand, and upon grounds of equal justice, the defendant (should the plaintiff's action fail) must be entitled to be repaid the expenses he has incurred in defending a wrongful claim. This seems to me to be the bed-rock, the very foundation-stone, of the just and rudimentary principle, that costs should follow the event of the suit.

I am not, however, so blindly devoted to this principle as to hold it to be of universal application. Like all general rules, it is not without exceptions. But in the case presented here, within the exceptions to the rule, it is as certain now as anything can be made, that a false claim was raised against the defendant, Massey (I do not mean this offensively), and that his land, descended from Mrs. Gilmore, was not liable to the debts of W. Taylor Gilmore, excepting that the plaintiff stands acquitted here of all imputations of bad faith. So far as the result is, he might as well have selected any other parcel of land in Chester county for the satisfaction of his debt.

It is contended, however, by the plaintiff's counsel (1) that the Circuit judge ordered the costs to be paid out of the proceeds of the land; (2) that from this portion of the decree there was no appeal; (3) that the Supreme Court left that portion of the Circuit decree untouched, and thereby affirmed so much of it as decreed costs against the defendants. Admitting the facts as stated, is this a legal sequence? I think not. It will be seen, by reference to the brief in the cause, that the defendant "appeals from the decree made," &c. What part of the decree? The answer would naturally be, from the whole decree. Certainly not from any particular part of it.

True, specific grounds of appeal are set out, bringing properly to the attention of the court of review the precise views which the appellant had of his case, and which he sought to impress

---

November Term, 1882.

---

upon the minds of the justices, regarding the matter of costs as an incident of the Circuit judge's view of the case, and only as an incident, and as such, in my opinion, it has followed the case through its various stages. Abiding the final determination of the cause, the following authorities were cited by the defendants' counsel, which I think sustain his view of the case. *Woodson v. Palmer*, *Bail. Eq.* 96; *Muse v. Peay*, *Dudley Eq.* 236; *Cleveland v. Cohrs*, 13 *S. C.* 402; 3 *Wait's Pr.* 454.

It is necessary, however, in order to complete this decree, to pass upon certain other allowances of costs which appear in the itemized taxation made by the clerk; that is to say: J. & J. Hemphill, attorneys, \$35; A. G. Brice, attorney, \$30. These attorneys represented others of the defendants than B. H. Massey, and the items above were allowed to them, and charged upon the proceeds of the land, which it will be borne in mind was sold by consent of parties pending the litigation hereinbefore referred to.

Having determined that this fund is not liable for the costs in controversy, how shall they be paid? The plaintiff's proceeding in this cause was not for the benefit of all who would join him in the suit and contribute to the expenses thereof. The attorneys above named represented creditors of W. Taylor Gilmore, whose claims were assailed by the plaintiff, and his complaint having been dismissed, and the assault rendered thereby futile, I know of no rule, equitable or otherwise, that can relieve him from liability to them for these costs. It is true that the plaintiff brought them into court. He invited them to go upon the voyage, but not for the purpose of sharing with him the pleasure or the profit of the round trip; for he gave them to understand most distinctly, in paragraph VII. of his complaint, that he would throw them overboard, if he could. The bark which sailed forth under such auspicious circumstances has been wrecked, and, hard as it may be, the inevitable consequence must follow the event of the suit.

Wherefore, it is ordered, adjudged and decreed as follows:

I. That the itemized taxation of costs, as made by the clerk, be and the same is hereby affirmed.

II. That the decision of the clerk, that said costs be paid from the proceeds of the sale of the lands sold in accordance

---

Opinion of the Court.

---

with the decree of his Honor, J. B. Kershaw, be and the same is hereby reversed.

III. That the defendant B. H. Massey, and the defendants represented by Messrs. J. & J. Hemphill and A. G. Brice, have leave to enter up judgments for the several amounts of costs allowed to them in the clerk's taxation against the plaintiff, John S. Bratton, with leave to issue executions for the same.

IV. That the three last items, to wit: Printing notice of sale of land twice, \$17.50; taxes on property sold, \$25.00; Clerk Curtis, commissions on sales, \$27.30; total, \$69.80, and any other expenses incident to the said sales, if there be any, be deducted from the proceeds of the sale, according to the proportionate interest of B. H. Massey and his co-tenant, Mobley, therein.

V. And that the costs of this appeal be taxed by the clerk of the court against the respondent, John S. Bratton, and that the several parties interested herein have leave to issue executions for the same.

*Mr. Giles J. Patterson*, for appellant.

*Messrs. W. B. Wilson, R. E. Allison, J. & J. Hemphill, A. G. Brice*, contra.

February 28th, 1883. The opinion of the court was delivered by

MR. JUSTICE McIVER. The action in this case was brought by the plaintiff, as a creditor of one W. T. Gilmore, against the defendant, Massey, who claimed the land in question under a deed from said Gilmore, the other creditors of Gilmore and his heirs-at-law, for the purpose of subjecting certain real estate to the payment of the debts of Gilmore. The real contest was as to the true construction of the deed under which Massey claimed, and Judge Kershaw, who heard the case on its merits, held that the land was subject to the payment of Gilmore's debts and ordered it sold for that purpose, the costs of the case to be paid out of the proceeds of the sale. From this decree Massey appealed, and the Supreme Court reversed the decree of Judge

---

November Term, 1882.

---

Kershaw and dismissed the complaint. *Bratton v. Massey*, 15 S. C. 277.

Subsequently the costs of the case were taxed by the clerk of the court, who held that they should be paid out of the proceeds of the sale, which had been made by consent, pending the appeal. This decision of the clerk was excepted to by Massey, substantially upon the ground that the clerk erred in deciding that the costs should be paid out of the proceeds of the sale, he contending that the costs should follow the event of the suit in the absence of any special provision to the contrary. Judge Cothran sustained the exceptions to the clerk's decision and adjudged that the defendant Massey, as well as certain of the creditors of Gilmore, whose claims were alleged by plaintiff to have been paid or otherwise discharged, and the defendant Annie McLure, an infant, the only one of the heirs-at-law of Gilmore who answered the complaint, were entitled to tax their costs against the plaintiff; that the costs and other expenses incident to the sale of the land should be paid out of the proceeds of the sale, and that the costs of the appeal from the clerk's decision should be paid by the plaintiff.

From this judgment the plaintiff appeals upon various grounds which may be stated substantially as follows: First. Because the Circuit judge erred in holding that the decree of Judge Kershaw, so far as it related to costs, was reversed. Second. Because of error in holding that, in the absence of any special provision to the contrary, the costs followed the event of the suit. Third. Because costs were adjudged against the plaintiff in favor of some of the defendants who concurred in the prayer of the complaint. Fourth. Because, under all the circumstances of the case, the costs should be paid out of the proceeds of the sale.

It is quite clear that the first ground cannot be sustained. The appeal was not from any particular portion of Judge Kershaw's decree, but the appeal was from the decree—meaning, of course, the whole decree—and the judgment of the Supreme Court was “that the judgment of the Circuit Court be reversed and that the complaint be dismissed.” This, of course, operated as a reversal of the whole decree. It is very true that in the former appeal that portion of the Circuit decree relating to costs



## Opinion of the Court.

was not specially attacked, but the provision as to costs was a mere incident to the judgment on the merits, and when that was ascertained to be erroneous and was reversed, and the complaint was dismissed, the provision as to costs was likewise reversed and fell with the judgment on the merits.

The judgment of the Supreme Court not having made any provision as to costs, they would necessarily be governed by the general rule upon the subject. The inquiry then is, What was the rule upon the subject at the time this case was determined? Prior to the adoption of the code of procedure the well settled rule was, that in cases of the class to which this belongs, in the absence of any special provision in the decree as to costs, they followed the event of the suit. *Woodson v. Palmer*, *Bail. Eq.* \*95; *Muse v. Peay*, *Dud. Eq.* 236; *Higginbottom v. Peyton*, 4 *Rich. Eq.* 316; *Brown v. Wood*, 6 *Id.* 360. It is true that by section 332 of the code of procedure, as originally adopted, other provision was made as to costs, in cases like this, where the relief sought was such as, prior to the code, could only be obtained in a court of equity (*Mars v. Conner*, 9 *S. C.* 79), but that section of the code was repealed by the act of February 20th, 1880, (17 *Stat.* 303,) prior to the hearing of this case, and that act contains no provision upon the subject. Hence, at the time judgment was rendered in this case, there was no statute or rule of court prescribing which of the parties should pay costs in a case like this, and hence, under rule 71 (now known as rule 72) of the Circuit Court, "the practice, as it has heretofore existed in the courts of law and equity of this State," must govern. We do not see, therefore, how the second ground of appeal can be sustained.

As to the third ground, which questions the propriety of the decision of the Circuit judge as to the costs of certain of the defendants; and the fourth ground, which claims that, under all the circumstances of this case, the Circuit judge should have directed that the costs should be paid out of the proceeds of the sale of the land, it is sufficient to remark that, under the practice governing at the time this case was heard, costs in an equity case were in the discretion of the Circuit judge, and, therefore, the manner in which that discretion has been exercised is not

---

November Term, 1882.

---

ordinarily a subject-matter of appeal. *Singleton v. Allen*, 2 *Strobh. Eq.* 174; *Hext v. Walker*, 5 *Rich. Eq.* 7; and we may add that we think, in this case, the Circuit judge has fully vindicated the propriety of his conclusions.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

KAMINER v. HOPE.

1. It not appearing that the question presented by this appeal was ever brought to the attention of the Circuit Court, the well settled rule forbids its consideration by this court; but, under the circumstances of this case, the rule was relaxed and the point adjudicated.\*
2. A decree against an administrator of an administrator at the suit of an administratrix *pendente lite* of the first intestate for an accounting, is sufficient to sustain an action against the sureties on such defendant's administration bond.
3. While the authority and power of an administrator *pendente lite* is much more limited in its nature than that of a general administrator, yet he may bring actions to recover debts due his intestate's estate. Cases reviewed.

---

Before COTHRAN, J., Lexington, September, 1881.

The case is fully stated in the Circuit decree, which was as follows:

This cause came on for trial before the court and a jury, at the fall term, 1881, of the court of Lexington county. By

---

\*This rule was here relaxed, as stated in the syllabus, and in the case of *Sawyer, Wallace & Co. v. Macaulay*, ante p. 543, exceptions having no proper foundation in the Case submitted to this court, were considered *ex gratia*. But in both cases, the result reached was the same as if the technical rule had been applied. It is not probable that such exceptions would be considered, the appellee objecting, if they led the court to a reversal of the judgment below.

The principal case shows the necessity of having it to appear in the brief that points made on circuit and not alluded to in the decree of the Circuit judge, were so made. Where this is not shown by exceptions to a master's or referee's report, it can be accomplished by a simple statement to that effect.—REPORTER.

---

Circuit Decree.

---

agreement of parties, the question as to the amount of the penalty of the bond signed by defendant's intestate, John C. Hope, as surety of Levi Gunter, the administrator of Martin T. Leaphart, was alone submitted to the jury, upon which they were required to find a special verdict, all other questions being reserved for the judgment of the court. The jury having found that the penalty of the administration bond signed by defendant's intestate was \$20,000, it devolved upon me to ascertain and fix the liability of the defendant's intestate as the surety of Levi Gunter.

The facts of the case, in so far as they are necessary for the proper understanding of this question, are as follows: Simon A. Leaphart, late of the county of Lexington, departed this life intestate some time during the year 1853, leaving as his only heir-at-law his widow, Mary Leaphart, and an only child, Polly Leaphart. Shortly thereafter his brother, Martin T. Leaphart, administered upon his estate, and reduced the same into his possession, reporting, on January 1st, 1854, a balance in hand of \$4,894.50.

On April 24th, 1855, Mary Leaphart and Polly filed their bill in the Court of Equity for said county, against said Martin T. Leaphart, as administrator of Simon, praying an account of the estate of his intestate. The rights of the said Mary and Polly to claim, as heirs of Simon, were contested upon the ground of the illegality of the marriage of Mary with Simon, and the consequent illegitimacy of Polly.

Martin T. Leaphart died in the month of May, 1860, never having accounted; and thereafter Levi Gunter administered upon his estate, giving bond to the ordinary of Lexington county for the faithful discharge of his duty, with John C. Hope, defendant's intestate, as surety on said bond. Prior to his death, to wit, on April 9th, 1860, Martin made a deed of assignment to Gunter for the payment of his debts, under which Gunter sold the property of the said Martin, amounting to \$15,164.57, out of which he paid Martin's debts, as directed in the assignment. Martin died before the sale. Gunter administered upon his estate, and sold the balance of his personal estate for about \$150, and in his account with the ordinary,

---

November Term, 1882.

---

as administrator, in January, 1861, showed a balance in hand of \$11,125.

On March 28th, following, the said complainants filed their bill of revivor against Levi Gunter, as administrator of Martin T., with whom were joined, as defendants, George J. Leaphart, James E. Drafts and Sarah, his wife—the other heirs-at-law and next of kin of the said Martin T. By the several answers to this bill of revivor, like issues as to the legality of the marriage of Mary with Simon and the legitimacy of Polly, were raised, which had to be settled before an accounting could be had.

These questions being decided favorably to the complainants, (*Leaphart v. Leaphart*, 1 S. C. 199,) the other issues, both of law and fact, were, on January 5th, 1871, referred to Francis W. Fickling, Esq., who, on March 1st, 1871, reported in favor of the plaintiff Mary the sum of \$4,047.68, and in favor of the plaintiff Polly the sum of \$8,095.37, against the said Levi Gunter, being the amount due the estate of Simon by Gunter's intestate, Martin T., and in favor of the plaintiff Polly the further sum of \$2,048.60, as one of the distributees of the said Martin T.

This report having been confirmed by the court, judgment was thereupon, on October 30th, 1873, entered up in favor of said complainants against the said Levi Gunter, and his entire estate advertised and sold by the sheriff of Lexington county. After applying the proceeds of such sale to the satisfaction of the judgment, there remained still due and unpaid by the said Levi Gunter the sum of \$15,490.48. Mary Leaphart died intestate some time during the year 1872, and thereafter, to wit, on September 2d, 1872, Thomas L. Kaminer, one of the plaintiffs herein, administered upon her estate.

Upon the judgment of the court thus rendered against the said Levi Gunter, this action was instituted against the said John C. Hope (who was then living), one of the sureties upon Gunter's administration bond, for the balance due on said judgment. The cause was brought to a trial before the Honorable Thompson H. Cooke, one of the judges of this court, and a jury, at Lexington, in July, 1876, and upon a full submission of the cause to the jury the following verdict was rendered: "We find

## Circuit Decree.

that the penalty of the bond executed by Levi Gunter, as administrator of Martin T. Leaphart, with John C. Hope, the defendant herein, as surety, was for the sum of \$20,000. We find that the amount now due by Levi Gunter, as administrator of Martin T. Leaphart, to the plaintiff by reason of his *devastavit* of the estate of said Martin T. Leaphart, and for which John C. Hope is liable in this action, is the sum of \$15,498.48, with interest thereon from October 5th, 1874." A motion was thereupon made for a new trial, which having been refused, an appeal was prosecuted to the Supreme Court, the order of the Circuit Court reversed and a new trial granted. *Kaminer v. Hope*, 9 S. C. 253.

This cause is now to be considered in the light of that judgment; and it having been therein held "that the plaintiff could not recover in this action the amount due the estate of Simon A. Leaphart by the late Martin T. Leaphart, as administrator, in the absence of an administrator *de bonis non* of Simon's estate," the pleadings were amended by adding William J. Assman, who had been in the meantime appointed administrator *de bonis non* of Simon A. Leaphart, as one of the plaintiffs. John C. Hope having also in the meantime died, the pleadings were further amended by adding as a party defendant, James C. Hope, as the administrator of John C. Hope. As thus amended, the cause is again presented for trial.

The plaintiffs claim that the defendant's intestate is liable for the full amount of the judgment rendered against his principal, Levi Gunter, by the Court of Equity. The defendant sets up three defenses: First. He denies the execution of the bond set forth in the complaint. Second. He denies the liability of his intestate upon the administration bond for a *devastavit* committed by Martin of the estate of Simon, and avers that the sureties upon the administration bond of Martin are alone answerable for such *devastavit*. Third. He denies that the sum of \$4,047.68 and \$8,095.37 were found to be due respectively in favor of Mary Leaphart and Polly Leaphart against the said Levi Gunter as administrator of Martin T. Leaphart, and chargeable upon the administration bond of Levi Gunter as a *devastavit* of the estate of the said Martin T. Leaphart.

---

November Term, 1882.

---

The first defense has been settled by the verdict of the jury in favor of the plaintiffs. The remaining defenses involve the questions reserved for the court, which I shall now proceed to consider :

It is urged by the defendants that as to the *devastavit* of Martin T. Leaphart, these plaintiffs should proceed against the sureties upon his official bond. True, they may elect so to do ; but why, when it appears that he (Martin) left an estate ample for the payment of debts, which passed into the hands of his administrator, Gunter ? The demands of these plaintiffs against Gunter is for the payment of a debt due by Martin to the estate of his intestate, Simon. I say a debt due the estate of Simon upon the death of Martin—for any sum which he was in arrears to Simon's estate was a debt due by the former to the latter. *Davis v. Wright*, 2 Hill 567 ; *Gill v. Douglass*, 2 Bail. 387.

Gunter admits assets, but in the proceedings before the Court of Equity fails to account for them. I am, therefore, unable to see upon what principle his surety can avoid responding to his default, according to the condition of his bond. The liability of the surety is to make good the injury which may be sustained in consequence of the misconduct of the principal. *Ordinary v. Shelton*, 3 McC. 417 ; *Davis v. Wright*, 2 Hill 567 ; *Wiley v. Johnsey*, 6 Rich. 358 ; *Ordinary v. Mortimer*, 4 Rich. 275.

These authorities furnish an ample exposition of both the responsibility and the liability of the surety. Martin having converted the entire estate of Simon, the only right which remained to the administrator *de bonis non* was to demand of the personal representative of Martin an account, and ask judgment for such balance as may be ascertained to be due by the latter to the estate of his intestate. *Villard v. Robert*, 1 Strobb. Eq. 402.

Such accounting being had and balance ascertained against the administrator, it is the well recognized practice for the administrator *de bonis non*, upon the decree of the ordinary or Court of Equity, to sue the administrator of the former administrator upon his bond in an action at law, and, when necessary, to join in the action the sureties upon his bond.

Governed by the rule laid down in *Ordinary v. Carlisle*, 1

## Circuit Decree.

*McM.* 100, the defendant's intestate can be discharged only by showing that his principal, Levi Gunter, received no assets which were liable for the payment of the *devastavit* committed of the estate of Simon A. Leaphart, or by otherwise pointing out in what particular it would be improper to charge him in this action with the entire amount of the judgment against Gunter in the former suit. *Kaminer v. Hope*, 9 *S. C.* 257. This he has not done, though full opportunity was allowed. This, in fact, he could not do, since it appears from the returns of Gunter before the ordinary in January, 1861, that there remained in his hands, after the payment of all other debts of Martin T. Leaphart, an amount largely in excess of that due the estate of the said Simon A. This Gunter should have applied in payment of the claim of Martin's intestate, or, pending the litigation, he should have paid the fund into court or otherwise invoked the aid of the court, and sought the appointment of some one to whom he would be authorized to pay the same. He, however, saw fit to join in the controversy raised by the Leaphart family, who were all in antagonism to plaintiffs, and to assume the risk, pending the litigation, of holding and controlling the fund. That it has been lost is the result of his own voluntary act, and the obligation to secure parties in interest against just such risk the sureties assumed by the very condition of his bond.

But suppose, as is urged by the defendant, that the plaintiffs be required in the first instance to proceed against the sureties of Martin. Would they not, having been required to respond to Martin's default, have the right to proceed against Martin's estate, in the hands of Gunter, his administrator, and to hold him and his sureties for the default of Martin by them paid? This being true, why insist upon such diversity of action? The sureties of Martin would be subrogated to any right of the creditor of Martin whose claim they had been required to pay. *Hampton v. Levy*, 1 *McCord Ch.* 116; *Lowndes v. Chisolm*, 2 *Id.* 455; *Perkins v. Kershaw*, 1 *Hill Ch.* 344; *Rhame v. Lewis*, 13 *Rich. Eq.* 330, 332.

It is further urged by the defendant that he can, under no circumstances, be held for a greater sum than that found by the

---

November Term, 1882.

---

referee in favor of the plaintiff Polly, against Levi Gunter, as administratrix of Martin T.; and he denies that the sums of \$4,047.68 and \$8,095.37 were found to be due respectively in favor of Mary Leaphart and Polly Leaphart against the said Levi Gunter, as administrator of Martin T. Leaphart, and chargeable upon the administration bond of the said Levi Gunter as a *devastavit* of the estate of said Martin T.

This defense is bottomed upon the judgment of the referee, which is as follows: "I therefore find for the plaintiff Mary, the sum of \$4,047.68, and for the plaintiff Polly, the sum of \$8,095.37, against the defendant, Levi Gunter, on account of the estate of Simon A. Leaphart; and for the plaintiff Polly, the sum of \$2,048.60, against the defendant, Levi Gunter, as administrator of the estate of Martin T. Leaphart." The argument of the defendant is that in respect to these two amounts the judgment is against Gunter personally—not against him as administrator of Martin, and, therefore, his surety cannot be held liable.

It must be observed that the manner in which the referee has stated the account was a necessary consequence of the separate interests of the plaintiffs, Mary and Polly, and should not be construed as indicating a liability of Gunter in different capacities. The bill was wide in its scope, seeking in the outset an account alone of the estate of Simon A. in the hands of Martin T., his administrator. Upon the death of Martin T., pending the suit, the bill had to be revived against Gunter, his administrator, and thenceforward involving the additional interest of Polly as one of the distributees of Martin.

The referee adopted a convenient and proper mode of expressing the separate interest of each of the plaintiffs; but I cannot see that it operates to charge Gunter in any other capacity than as administrator of Martin. The proceeding throughout, so far as it operated against him, was in his representative capacity, and a judgment could only be rendered against him as such, except, however, that as for any *devastavit* adjudged against him satisfaction may be ordered out of his individual estate. The amounts adjudged, as appears by the referee's report, in favor of Mary and Polly, respectively, were due by Martin to the estate of



---

Circuit Decree.

---

Simon, his intestate, and assets sufficient for the payment of same having come into the hands of Gunter, he and his sureties are liable therefor.

But, further, in support of the view I feel constrained to take of the defenses now under consideration, I regard the judgment of the Supreme Court heretofore rendered in this case (9 S. C. 253) conclusive of the proposition. The defenses herein set up were all before the court in the former trial and before the Supreme Court upon the appeal. After deciding that the refusal on the part of the Circuit judge to charge upon certain propositions of law as requested by the defendant was sufficient ground for a new trial, Kershaw, acting Associate Justice, speaking for the court, says: "Other questions are made by the appeal which it will be proper to settle in order that the new trial may be conducted in the light of a decision of the points of law involved."

The very questions now under discussion were then considered, and in holding that the judgment against Gunter could only be *prima facie* evidence against his surety, the court say: "The appellant has, therefore, a right to look into the decree and point out in what particulars it would be improper to charge him in this action with the entire amount of judgment against Gunter in the former suit. Of that amount the sum of \$12,143.05 was for a liability of Gunter to the estate of Simon A. Leaphart. This arose from the sale and conversion of assets of the estate of Simon, which were in the hands of Martin as administrator, and by him assigned to Gunter, together with the bulk of his own estate, upon a trust to pay certain debts of the assignor from the proceeds. The decree against Gunter was for the residue of the fund left after performing the trust. This residuum, it is here claimed, was an asset in the hands of Gunter, as administrator of Martin, to be accounted for by him in that capacity. He himself so treated it in his accounts. The plaintiffs, also, have so treated the funds, and thereby ratified, so far as they are concerned, the conversion by Martin of Simon's assets. The fund derived from such conversion is, therefore, for the purposes of this decision, to be treated as vested in Martin's estate and to be accounted for by his administrator."

---

November Term, 1882.

---

To whom, then, assuming this view of the argument as most favorable to the plaintiffs, is he, Gunter, to account for the fund? Evidently to the creditors of his intestate in the first instance, and afterwards to his distributees. Of the amount decreed against Gunter, \$12,143.05 was due the estate of Simon A. Leaphart, for *devastavit* of Martin as administrator. Can this fund be recovered of the defendant in this case by the distributees of Simon A. Leaphart without an administration of the estate of Simon? Simply stated, the question is whether distributees can sue for and recover debts due their intestate's estate. Put in this form the affirmative would hardly be contended for. "It follows that the plaintiffs cannot recover in this action the amount due the estate of Simon A. Leaphart by the late Martin T. Leaphart, as administrator, in the absence of an administrator *de bonis non* of Simon's estate." 9 S. C. 257, 259.

Undoubtedly this amount was regarded by the court as a debt due by Martin to the estate of his intestate, for which Gunter, his administrator, was liable to account to the proper representative of Simon's estate. This party is now properly before the court, in the person of William J. Assman, as administrator *de bonis non* of Simon A. Leaphart, and I fail to see in the several grounds urged by the defendant anything to relieve his intestate from the liability of his principal.

The defendant further sets up the plea of "*plene administravit præter*," and files with his answer certified copies of the inventory and appraisement, and also of his return before the Probate Court for the year ending December 31st, 1880, by which it appears that the defendant possessed assets of his intestate to be administered, amounting only to the sum of \$961.06. No effort was made on the part of the plaintiffs to impeach these returns, nor to charge the defendant with more. This admission must, therefore, be taken as true, and the defendant can only be chargeable with the amount thus admitted, unless other assets of the intestate shall hereafter come into his hands to be administered as suggested in his answer.

There is no conflict between the plaintiffs in respect to their respective interest in the amounts sued for; but, in view of the judgment of the Supreme Court, I deem it proper to settle by

---

Exceptions.

---

the judgment now to be delivered these respective claims for the protection of the administrator *de bonis non*. In the course of the argument, the defendant, while urging the proposition that he could not be held liable for the amounts adjudged by the referee against Gunter on account of Simon's estate, contended that the amounts heretofore collected from Gunter should be credited wholly upon the recovery in behalf of Polly, as one of the distributees of Martin. In the view I have taken of the liability of the defendant's intestate as the surety of Gunter, it is a matter of no consequence to him in what manner this application is made; and while to the plaintiffs it is also a matter of minor importance, I adopt the ratable application of such collections as the most proper.

It is therefore adjudged that the plaintiff William J. Assman, as administrator *de bonis non* of Simon A. Leaphart, recover against the defendant, as administrator of John C. Hope, deceased, the sum of \$13,277.56, with interest from October 5th, 1874; and the plaintiff Polly Leaphart recover against the said defendant, as administrator as aforesaid, the sum of \$2,212.92, with interest from October 5th, 1874; said debts, interests and costs to be levied of the goods and chattels which were of the said John C. Hope at the time of his death, in the hands of the said James C. Hope as administrator as aforesaid to be administered, and which may hereafter come into the hands of the said administrator to be administered, and of the lands, tenements and hereditaments which were of the said John C. Hope at the time of his death.

From this decree the defendant appealed upon the following exceptions:

1. Because it is respectfully submitted that the learned judge in his able opinion erred in the said judgment in this: That he has entirely overlooked the important point, earnestly pressed upon the court, that by the proceedings in equity (to which John C. Hope was not a party) referred to Francis W. Fickling as referee, and introduced as evidence in this case to show the amount of the liability of Levi Gunter as principal, and thereby to fix the liability of John C. Hope as surety, it appeared that

---

November Term, 1882.

---

the accounting was had at the suit of the administratrix *pendente lite* of Simon A. Leaphart, and not at the suit of an administrator *de bonis non*.

2. Because, this being true, until there was an accounting by the principal at the suit of an administrator *de bonis non*, there was no breach of the condition of the administration bond legally ascertained, and no verdict could be legally rendered and no judgment could be legally predicated on such verdict.

3. Because, this being a correct conclusion of law, the Circuit judge erred in ordering judgment in any amount whatever, under any finding as to the penalty of the bond, before the breach of the condition had been legally ascertained in the suit against the principal, and, *a fortiori*, in a suit against the surety.

*Mr. J. D. Pope*, for appellant, cited 1 *Strobh. Eq.* 402, 414; 2 *Bail.* 373, 387; 1 *Rich. Eq.* 123; *Rice* 350; 16 *S. C.* 432.

*Mr. W. A. Clark*, contra.

March 2d, 1883. The opinion of the court was delivered by

MR. JUSTICE McIVER. The facts of this case are so fully and clearly stated in the Circuit decree, that it is not necessary for us to do more than to make such a brief statement as will be necessary to indicate the single point raised by this appeal, especially as the case, in different forms, has been before this court on two former occasions when it was reported—first, under the title of *Leaphart v. Leaphart*, 1 *S. C.* 199, and, next, under the title of *Kaminer v. Hope*, 9 *S. C.* 253, where a full history of the litigation between these parties may be found.

The present action was brought against John C. Hope, as surety upon the bond of Levi Gunter, administrator of Martin T. Leaphart, and, upon his death, continued against the present defendant as his administrator, to recover the amount found due by Gunter as such administrator, as well to the estate of Simon A. Leaphart, of whom his intestate, Martin T., was administrator, as to the plaintiff, Polly Leaphart, as one of the distributees of said Martin T. The proceeding under which these amounts were found due by Gunter, as administrator of Martin T. Leap-

---

Opinion of the Court.

---

hart, was a bill in equity originally filed by Mary Leaphart and Polly Leaphart, claiming to be distributees of Simon A. Leaphart, against Martin T. Leaphart as his administrator. Upon the death of Martin T., Levi Gunter was appointed administrator of his estate, and a contest arising as to who was entitled to administration upon so much of the estate of Simon A. as was left unadministered by Martin T., letters of administration *pendente lite* were granted to Mary Leaphart. A bill of revivor was then filed, making Gunter, as administrator of Martin T., and the heirs-at-law of Martin, parties, and under this bill the account was taken which forms the basis of the present action.

The appellant contends that inasmuch as the account was taken in a proceeding in which the estate of Simon A. Leaphart was represented, not by an administrator *de bonis non*, but only by an administrator *pendente lite*, it was without authority and not binding, and, therefore, constituted no sufficient foundation for the present action, because the only person who could demand from the administrator of Martin an account of his actings and doings, as administrator of Simon, was an administrator *de bonis non* of the latter, and that such accounting could not be had at the instance of Mary Leaphart as administratrix *pendente lite*.

The respondent, however, makes a preliminary objection to the hearing of this appeal, which must first be disposed of. The objection is, that it nowhere appears in the "Case," as prepared for argument in this court, that the question now presented by this appeal was ever made or considered in the Circuit Court, and that according to the well-settled rule, we are precluded from considering such question. That such is the rule has been so often declared by this court that it is scarcely necessary to refer to the numerous cases in which it has been announced. It is only necessary, therefore, to ascertain whether it is true as matter of fact that the "Case" fails to show that such a question was made in the court below. We have examined the "Case" carefully and are unable to discover any evidence that such a question was ever presented to the Circuit judge for decision. His decree presents the facts of the case clearly, and discusses the legal questions presented fully and satisfactorily, and there is no intimation whatever that any such question as

---

November Term, 1882.

---

that now presented was ever brought to his attention. The grounds of appeal do not assail the correctness of any of the legal propositions laid down in the decree, but simply complain that the Circuit judge "overlooked" the point now relied upon. It is true that in the first ground of appeal it is distinctly asserted that the point was earnestly pressed upon the court below; but, as we have frequently had occasion to say, we are not at liberty to accept any statement of fact incorporated into the exceptions or grounds of appeal, unless such statement appears also in the "Case," and have found it necessary by a recent amendment of the rules of this court, to distinctly and formally declare the proper practice in this respect.

But this court is always reluctant to dispose of a case upon merely technical or formal grounds, and as the evidence incorporated in the "Case" shows clearly that the accounting relied upon as the basis of the present action was taken in a proceeding to which the administrator *de bonis non* of Simon A. Leaphart was not a party, but that his estate was represented in that proceeding by Mary Leaphart, as administratrix *pendente lite*, and as the question has been fully argued at the bar, we are disposed to relax the rule in this instance, and consider the question made by the appeal, as if there were no technical objection in our way.

It does not appear, nor is it suggested, that when the accounting relied upon was taken, Gunter, who was a party to that proceeding, interposed any objection on the ground of a want of proper parties, or in any way questioned the right of an administrator *pendente lite* of the estate of Simon A. Leaphart, to demand an account from him of the administration by his intestate, Martin T. Leaphart, of the assets of the estate of Simon A., and therefore Gunter would scarcely be in a position now to question the result or effect of such accounting; nor is it clear that Hope, as his surety, could question it on that ground, even though not himself a party to the proceeding in which such accounting was had, especially when the person who is admitted to have had the right to demand such accounting, the administrator *de bonis non* of Simon A., is now before the court

## Opinion of the Court.

recognizing and adopting, and thereby being bound by, such accounting.

But waiving this, let us consider the main question presented, whether the administratrix *pendente lite* of the estate of Simon A. could maintain an action against Gunter as administrator of Martin T., to recover the amount due by him as administrator of Simon A., or could this be done only by an administrator *de bonis non* of the estate of Simon A.? It is quite true that Gunter, by virtue of his administration on the estate of Martin, was not the administrator of Simon, and that whatever balance which may have been due to the estate of Simon by the estate of Martin, was nothing more than a debt due by the one estate to the other. Hence, as was held at the former hearing of this case, (*Kaminer v. Hope*, 9 S. C. 253,) such a debt could not be recovered by the distributees of Simon, but must be sued for by a proper representative of his estate, and none such being then before the court, Mary Leaphart, who had been administratrix *pendente lite*, having died before the commencement of this action, it was necessary that the proceedings should be amended by making the administrator *de bonis non* of the estate of Simon, a party; which was subsequently done.

But the question still recurs, whether the administrator *pendente lite* was not such a proper representative of the estate of Simon, as that she could maintain an action to recover the debt due to her intestate's estate by the estate of Martin, or could the action be brought only by an administrator *de bonis non*? It seems to be well settled, both upon principle and authority, that while the authority and power of an administrator *pendente lite* is much more limited in its nature than that of a general administrator, yet he may bring actions to recover debts due his intestate's estate. The leading case upon the subject, which has been repeatedly recognized since, is the case of *Walker v. Woollaston*, 2 P. Wms. 576, in which the doctrine above stated was distinctly laid down, and in the argument of counsel in that case, which seems to have been adopted by the court, but which is too long to be transcribed here, it is conclusively shown to be fully supported both by reason and authority, and absolutely necessary to effect the objects of such a limited

---

November Term, 1882.

---

administration. See also the cases of *Knight v. Duplessis*, 1 Ves. Sr. 325; *Ball v. Oliver*, 2 Ves. & B. 97; *Gallivan v. Evans*, 1 Ball & B. 192; *Wills v. Rich*, 2 Atk. 285.

In our own State, we do not think that the question has ever been distinctly decided, the authorities relied upon by the appellant not being in our judgment directly in point. They are all cases in which the question was, whether the action could be maintained by creditors or distributees, and we are not aware of any case in which the distinct question made by this appeal has been raised. It is true that in some of the cases strong language is used implying that such an action as this could only be maintained by an administrator *de bonis non*, but those expressions must be taken with reference to the facts of the cases in which they occur, and signify that, as between creditors or distributees and an administrator *de bonis non*, the action can only be maintained by the latter.

In *Gill v. Douglass*, 2 Bailey 387, (which, however, has been qualified by the subsequent case of *Ford v. Dangerfield*, 8 Rich. Eq. 110,) the action was by the escheator of Lancaster district to recover a balance due by the estate of the defendant's intestate on his administration of the estate of Dr. Clancy, who had died intestate, leaving no one entitled to claim as next of kin. The court held, that the escheator stood as a distributee and could not maintain the action, which should be brought by a legal representative of the first intestate; but whether such legal representative must necessarily be an administrator *de bonis non*, or whether an administrator *pendente lite* would not answer as such representative, is not even hinted at in the case.

In *Easterling v. Thompson*, Rice 346, an effort was made by creditors to reach the assets of the first intestate through an administrator of the deceased administrator of such intestate, and the court held that they could only proceed against an administrator *de bonis non*, whose duty it would be to require an account from the administrator of the first administrator, and no question was raised as to what would be the rights or duties of an administrator *pendente lite*.

In *Stevenson v. Wilcox*, 16 S. C. 432, the action was brought by the creditors of an intestate against the sureties of an admin-



## Opinion of the Court.

istrator *pendente lite*, and the court held that such an administrator was accountable only to the general administrator, and not to the creditors or distributees, as he had no authority to pay debts or distribute the assets; but the question, whether an administrator *pendente lite* could maintain an action to recover a debt due his intestate's estate, was not, and could not have been, raised in the case.

In *Villard v. Robert*, 1 *Strobh. Eq.* 393, the question was whether a settlement, made by the representatives of an executor, on an accounting had with an administrator *de bonis non cum testamento annexo*, for assets of the testator, converted into money by the executor in his life-time, was a bar to an action by the legatees against the representatives of such executor; and the court held that it was, because the administrator *de bonis non* had a right to demand such accounting from the executor, practically overruling what was said in *Smith v. Carrere*, 1 *Rich. Eq.* 123, on this point; but nothing was said as to the right of an administrator *pendente lite* to bring an action for such accounting.

From this review of the authorities, it seems to us that the English cases establish the proposition, that an administrator *pendente lite* may maintain an action to recover a debt due the estate of his intestate, and that there is no controlling authority in this State to the contrary; and inasmuch as to deny this right to such an administrator would, in many cases, practically defeat the object of appointing a limited administrator, by delaying the collection of the assets of an intestate, and thereby, perhaps, incurring the hazard of their entire loss, pending a controversy in the Court of Probate, we think that the doctrine established by the English cases has not only the support of authority, but is well founded in reason. We must, therefore, conclude that, outside of any mere technical objection, this appeal cannot be sustained.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

November Term, 1882.

---

## WILLIAMS v. WALKER, FLEMING &amp; CO.

1. A finding of fact by referee and Circuit judge approved.
2. A note and mortgage given by a wife for the amount of a debt due by her husband, in consideration of her release from arrest and imprisonment under a charge of selling goods covered by a lien without notice, and of a discontinuance of such criminal prosecution, are illegal, and in action brought by her, the note and mortgage were ordered to be canceled and surrendered.

---

Before FRASER, J., Spartanburg, July, 1881.

Action by A. J. Williams and Diana, his wife, against Walker, Fleming & Co. The Circuit decree was as follows:

This case came before me on the report of the special referee, C. P. Wofford, Esq., and exceptions thereto by the defendants. The action was brought to set aside a note and mortgage given by Diana Williams, one of the plaintiffs, to the defendants, on the grounds: First, that she was forced to execute the same by threats and intimidations; and, second, that there was no consideration for the same.

The real estate covered by the mortgage was the property of Diana Williams, derived by her from the estate of her first husband, her two children being entitled each to one-third of the tract of land, and her one-third only being mortgaged. It appears from the testimony that Diana Williams intermarried with A. J. Williams, her present husband, over sixteen years ago, and, of course, before the adoption of our present State constitution. The mortgage in this case is signed by her alone, and her husband did not join, neither is there any renunciation of inheritance by her. Perhaps, for some good reason which these proceedings do not reveal, no question has been made as to the right of Diana Williams to make any valid conveyance of her land in the mode adopted in the execution of this mortgage.

It is unnecessary to consider whether the failure of the plaintiffs to except to the report of the referee on the ground that the

## Circuit Decree.

referee found that there was no duress, can prevent this court from coming to a different conclusion, if, on examining the testimony, it appears that for any reason the referee did not err in the language of second exception, "in finding that the said note and mortgage are void," or of the fourth, "in refusing to dismiss the complaint."

The husband and wife had both been arrested on a charge of selling property under a lien without giving notice to the purchaser. The husband was in jail and the wife was informed that she must find bail in the sum of five thousand dollars (\$5,000), or go to jail. The only other alternative left to her was to sign the note and mortgage of this land for an amount sufficient to pay her husband's debts to the defendant, except a small deduction of \$40. For these debts she was in no way liable, and a large part of the indebtedness was an old debt not even covered by the lien held by defendants on the husband. It may be that both plaintiffs might have been convicted if the prosecution had been pressed against them.

I am satisfied, however, that whatever benefit or advantage the defendants expected to derive from the transaction, or whatever other incidental advantages in the way of a deduction of \$40, and an extension of time, may have accrued to A. J. Williams, the husband, no such benefit accrued directly to Diana Williams. She had no pecuniary interest in the arrangement or settlement of the debts of A. J. Williams. The only consideration moving to her was the release from arrest and the discontinuance of the prosecution. The clearer her guilt, the stronger the motive. "Courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment, and if there is the slightest ground to suspect oppression or imposition in such cases, they will set the contracts aside." 1 *Story Eq.*, § 239.

The general rule is that agreements for compromise of public prosecutions are illegal and void. This doctrine was conceded in *Corley v. Williams*, 1 *Bail.* 588, and the only exception contended for was that it did not apply to assaults and batteries, and other misdemeanors of a private nature. The reason for this exception is given by Judge O'Neill, in *Mathison &*

---

November Term, 1882.

---

*Kingsby v. Hanks*, 2 Hill 625, in these words: "This double remedy (in assaults and batteries) is unnecessary, for the universal practice in England, and in this State, is, when the prosecutor is the party injured, and the defendant makes adequate reparation to him, to impose only a nominal fine."

The analogy between the offense charged against these plaintiffs and cases of assault and battery fail in at least two very important particulars: First. The least punishment that a judge can inflict on a person convicted under the act of 1873 (15 Stat. 332) is imprisonment for not less than ten (10) days and a fine not less than ten (10) dollars. I do not regard this as nominal. Second. In assault and batteries the very act which is the gist of the prosecution in the criminal action is the gist of the action in the Common Pleas, or the civil side of the court.

The injury done to the person who holds a lien over property, which is sold without notice, is the non-payment of his debt, and unless this is the result there is no injury done to him. The public offense in law is the same where the property sold is the last or only resource for the payment of his debt, or whether there is ample left to meet all demands on the property. The act is in itself no private wrong, and, unless an injury should follow, there is nothing to redress but the public wrong, which can be redressed only by a criminal action.

The practice of using the criminal process of the courts to redress private wrongs is not to be encouraged; and I am especially unwilling to lend the aid of the court to private parties who use the criminal process of the court to enforce against parties in no way liable for them, their claims against another person, and which, as in this case, have no connection whatever with the act which is the subject of the criminal action.

It is, therefore, ordered and adjudged: First. That the exceptions be overruled, and that the report of the referee be confirmed. Second. That the defendants and each of them be forever enjoined from collecting or attempting to collect and enforce the payment of the note or foreclosure of the mortgage described in the pleadings in this case. Third. That the defendants do deliver the said note and mortgage to the clerk of

---

Opinion of the Court.

---

this court, to be by him canceled and delivered to the plaintiff Diana Williams. Fourth. That the defendants pay the costs of of this action.

Defendants appealed.

*Messrs. Bobo and Carlisle*, for appellants.

*Mr. J. S. R. Thomson*, contra.

March 3d, 1883. The opinion of the court was delivered by

MR. JUSTICE McIVER. The plaintiff Diana owns an undivided one-third interest in a certain tract of land in Spartanburg county, derived from the estate of her former husband, prior to her marriage with her present husband, and her two children by her former marriage own the remaining two-thirds. The family live upon this tract of land and work it together. In the year 1879, A. J. Williams gave a lien on the crop to defendants for fertilizers, and in the fall of that year C. E. Fleming, one of the members of the firm of Walker, Fleming & Co., sued out a warrant against A. J. Williams and Diana Williams for selling property covered by the lien without giving notice to the purchaser of the existence of such lien, in violation of the provisions of the act of February 12th, 1873, (15 Stat. 332.)

Under this warrant the plaintiffs were arrested and required to give bail in the sum of five thousand dollars, the maximum of the pecuniary penalty prescribed in said act, and A. J. Williams, in default of bail, was committed to jail. While Diana Williams was under arrest, but before she was actually committed to jail, negotiations were opened for a settlement of the whole matter, which resulted in an arrangement whereby Diana gave her note to the defendants, dated November 20th, 1879, payable twelve months after date, with interest from date, for \$323.05, in satisfaction of the amount due under the lien, and also of an old note due to Walker & Fleming, by A. J. Williams, upon which a deduction of \$40 was made, and also paid the costs of the criminal proceeding. Thereupon the plaintiffs were discharged from arrest and imprisonment and the criminal proceedings were discontinued.

---

November Term, 1882.

---

Soon afterwards this action was commenced for the purpose of having said note and mortgage declared void, and the same delivered up to be canceled. By consent the case was referred to a referee, "to take testimony, pass upon all issues of law and fact arising herein, and report the same to court with his recommendations thereon." The referee took the testimony, which is set out in the "Case," and made a report in which, while he failed "to find such circumstances of duress as will, of themselves, avoid the note and mortgage, if the arrest was legal and regular," he did find as matter of fact "that the whole consideration of the note and mortgage in this case, was the release of the plaintiff from arrest and the stopping of the prosecution." And as matter of law he found "that the said note and mortgage are void \* \* \* and should be delivered up to be canceled, and that the defendants should be forever restrained from proceeding to enforce them."

To this report the defendants excepted, alleging error in the findings both of fact and law. The Circuit judge overruled the exceptions and confirmed the report, and from his judgment defendants appeal upon various grounds, which may be stated substantially as follows: 1st. Because the Circuit judge erred in overruling the exceptions to the referee's report. 2d. Because of error in holding that a consideration to support a contract must import some advantage to the promisor. 3d. In holding that the testimony showed no legal consideration for the contract of the plaintiff Diana Williams, evidenced by the note and mortgage, except the discontinuance of the criminal prosecution against her. 4th. In holding that said contract was thereby rendered void. .

The question as to what was the real consideration of the note and mortgage, was one of fact, and that question has been answered adversely to the appellants, both by the referee and the Circuit judge, and so far from there being any lack of evidence to support their findings, we think it must be clear to every unprejudiced mind, from the testimony in this case, that the sole moving cause which induced the plaintiff Diana to sign the note and mortgage was to secure release from arrest and imprisonment, and a discontinuance of the criminal proceeding. She

---

Opinion of the Court.

---

was in no way responsible for the debts of her husband, and although she may, as the referee says, have participated in the benefit accruing from the money advanced under the lien, and perhaps in the money or supplies which were the consideration for the old note, yet this is nothing more than what might be said in most, if not all, cases in which a husband living with his wife obtains money or supplies upon his own credit, or upon the faith of a lien on his crop. She was not bound, either legally or morally, to pay such a debt, and the creditor who chooses to extend credit to the husband alone, must look alone to him for payment. There was no evidence whatever tending to show that A. J. Williams had leased the land upon which the crop was made, from his wife and her children by a former marriage, and thereby acquired a right to give a lien on it, but, on the contrary, the referee says that "they all worked the place together, and the plaintiff A. J. Williams shared in the proceeds of the crop." It may well be questioned, therefore, whether he had any right to give a lien upon the crop.

Assuming, then, as matter of fact, as we are bound to do, not only from the concurrent findings of the referee and the Circuit judge, but also from our own view of the testimony, that the true consideration of the note and mortgage was the release of the plaintiff from arrest and imprisonment, and a discontinuance of the criminal proceeding, the next inquiry is, whether such a consideration was sufficient to support the contract evidenced by the note and mortgage. The general rule is that such a consideration is illegal, and the only exception seems to be in cases of assault and battery, and other misdemeanors of like nature, where it has been held that a note given to the party injured by the person who has inflicted the injury may be sustained upon the ground that the real consideration is the compensation due to the one by the other for the personal injury which he has sustained, the amount of which has been ascertained by an agreement of the parties, instead of by the verdict of a jury; and inasmuch as it is the settled practice in this State to impose only a nominal punishment under a conviction for assault and battery where the party injured has also sought redress by a civil action

---

November Term, 1882.

---

for damages, a note given in compromise of a prosecution for assault and battery has been sustained.

But where a note is given by a person not liable for the damages sustained by the party injured, for the purpose of stopping a prosecution even for assault and battery, it will be held void as based upon an illegal consideration, because, in such a case, the consideration cannot be referred to the compensation due by the one to the other, for there is nothing due in such a case from the maker to the payee of the note, and the consideration must be referred to the stopping of the prosecution, and is, therefore, illegal. These views are fully supported by the following cases: *Corley v. Williams*, 1 *Bail.* 588; *Mathison v. Hanks*, 2 *Hill* 625; *Banks v. Searles*, 2 *McM.* 356; *Gray v. Seigler*, 2 *Strob.* 117.

Now, even conceding, what may well be questioned under the circumstances of this case, that Diana Williams might have been made liable, in a civil action for damages, for disposing of property covered by the lien, yet, as we have seen, she was never liable for the debts which the note and mortgage were given to secure, and there is no pretense that the note was given as a compensation for such damages. If she had been arrested for burning a house of the defendants, and the prosecution had been stopped upon her executing a note and mortgage to secure the payment of debts due by her husband, for which she was in no way liable, it might as well be said that, as she would be liable for the damages done to the defendants by the destruction of their house, such liability would constitute a sufficient consideration to support the note, as it can be said, in this case, that her liability for damages in disposing of property covered by the lien in favor of the defendants, constitutes a valid consideration for the note and mortgage here in question.

A court of equity will not readily sanction or recognize a contract which one has been induced to enter into for the purpose of securing immunity from a criminal prosecution. Such a use of criminal process violates every consideration of public policy, and whoever resorts to it should meet with condemnation rather than encouragement. It is quite manifest, from all of the circumstances of this case, and, indeed, is openly avowed by the



---

Syllabus.

---

defendant, who was the active agent in the whole proceeding, that the real purpose of the criminal proceeding was, not to promote the ends of public justice, but to secure the payment of a debt. Such a mode of collecting debts is certainly not entitled to the favorable consideration of a court of justice.

The second ground of appeal is taken under a misconception of the decree of the Circuit judge. We do not understand him to lay down the proposition, that a consideration to support a contract must necessarily import some advantage to the promisor, or to deny that forbearance or a release of part of a debt may constitute a sufficient consideration to support a promise to pay the debt of another. Under the view which he took of the testimony, such a question could not arise, and, therefore, it was not necessary for him to express any opinion upon it, nor did he undertake to do so.

We concur, therefore, in the view taken of the case by the Circuit judge, and are unable to see any ground upon which this appeal can be sustained. The judgment of this court is that the judgment of the Circuit Court be affirmed.

---

PATTERSON v. PAGAN.

1. A party brought in as defendant because the real claimant of the property in dispute, may put in issue the plaintiffs' capacity to sue.
2. Plaintiffs' incapacity to sue, not clearly appearing from the statements of the complaint, this defense could not be taken by demurrer; it was, therefore, properly made by answer and proof of the facts.
3. The proper probate of a will in another State, with letters testamentary there duly issued to the executors, and an exemplification of these proceedings marked by a probate judge in this State, "filed and admitted to probate," do not authorize such executors to bring action in this State, no letters testamentary being here issued.

---

Before WITHERSPOON, J., Fairfield, September, 1882.

The opinion states the case.

---

November Term, 1882.

---

*Mr. Jno. S. Reynolds*, for appellant.

*Mr. T. C. Gaston*, contra.

March 6th, 1883. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. This was an action by the plaintiffs, as executors of the will of Robert Patterson, deceased, late of Pennsylvania, originally brought against John D. McCarley, sheriff of Fairfield county, to recover the proceeds arising from the sale of certain crops seized and sold by him as sheriff under a warrant to enforce an agreement for rent of land executed by James Pagan to Robert Patterson, deceased. More than "thirty days" had elapsed between the said sale and the commencement of this action. By an order of June, 1882, James Pagan was interpleaded as a defendant, and answered.

The trial was had at the September term, 1882. The complaint alleged that "Robert Patterson, then a resident of the State of Pennsylvania, departed this life, leaving in full force his last will and testament, wherein the said Robert E. Patterson, W. Heyward Drayton and Hefry P. Smith, the plaintiffs, were appointed his executors, and that said will having been admitted to probate in the State of Pennsylvania, was duly admitted to probate and filed in the office of Probate judge of Fairfield county, in the State of South Carolina; and that the said executors have heretofore qualified and entered upon the discharge of their duties." The defendant answered, denying that the plaintiffs had legal capacity as executors to sue in this State.

It appeared by an exemplification of the proceedings that the will of Robert Patterson was duly admitted to probate in the proper office of the city and county of Philadelphia, in the State of Pennsylvania, and that letters testamentary thereon had been granted to the plaintiffs, as executors, on August 12th, 1881. A full copy of the proceedings in Philadelphia in probating the will had been recorded in the office of judge of Probate for Fairfield county, South Carolina, endorsed, "Filed and admitted to probate December 29th, 1881," but no further proceedings were taken. The persons named as executors never

---

Opinion of the Court.

---

qualified as such or received letters testamentary in this State. The sheriff testified that James Pagan had never filed an affidavit denying that the amount claimed was due on the lien for rent mentioned in the complaint, but before the sale of the cotton he had served written notice claiming that the cotton was his property, not subject to Patterson's lien.

The plaintiffs here rested and the defendant moved for a nonsuit on the ground that the plaintiffs had not established their legal capacity to sue. The motion was refused, a verdict rendered for the plaintiffs, and the defendant appeals to this court upon the following grounds: First. "For that his Honor held that upon proving the testator's will in the office of the judge of Probate, the plaintiffs become legally capable of suing in this State. Second. For that his Honor held that under section 1875 of the general statutes, the plaintiffs, as executors, are authorized to prosecute this action to judgment. Third. For that his Honor did not hold that to enable the plaintiffs, as executors, to prosecute this action, they must have qualified in this State according to the form prescribed in the general statutes. Fourth.\* For that his Honor did not hold, in order to enable the plaintiffs, as executors, to prosecute this action to judgment, they must have received letters testamentary from the Court of Probate in this State. Fifth. For that his Honor did not hold that the plaintiffs have not legal capacity to sue, and dismiss the complaint.

The plaintiffs contend that the defendant Pagan has no right to make the objection of want of capacity on their part to sue, for the reason that no claim was made against him—that he was not originally sued, but the sheriff for money in hands, and Pagan claiming the same money was brought in by interpleader and thereby merely allowed to support his own claim to the money, but not to dispute others. We find Pagan on the record as the defendant, and we know of no rule of law which limits his rights as defendant on account of the manner in which he was brought in. No authority was cited to sustain the view suggested. It does not appear at whose instance he was made a defendant, but we suppose that he was substituted for the party originally sued, under the authority of the last paragraph of

---

November Term, 1882.

---

section 145 of the code, which provides, that at the instance of a defendant against whom a claim is made for the property in controversy, by a person not a party to the action, the "court may grant an order to substitute such person in his place," &c.

The plaintiffs also claim that Pagan could only avail himself by demurrer of the defense of want of capacity in the plaintiffs to sue. The defendant is authorized to demur when the facts which constitute the defense appear upon the face of the complaint; but if it does not show the facts upon its face, the objection can only be made by answer and proof of the facts. *Code*, § 170; 2 *Wait Pr.* 448. In this case, the fact upon which the defense rested did not clearly appear upon the face of the complaint, which stated that, "the said will, having been proved and admitted to probate in the State of Pennsylvania, was duly admitted to probate, and filed in the office of the Probate judge in Fairfield county, in the State of South Carolina; and that the said executors have heretofore qualified and entered upon the discharge of their duties." Without explanation, this statement might be construed to mean that the executors had qualified and entered upon their duties in South Carolina. From the context this would seem to be the proper meaning, and a demurrer (which admits the facts as stated) might have failed to make the point intended and defeated the defense, as the proof showed that the plaintiffs never qualified and entered upon the discharge of their duties in the State of South Carolina.

The main question in the case is, whether the plaintiffs had legal capacity to sue as executors of Robert Patterson's will, upon which they had qualified and received letters testamentary in the State of Pennsylvania, but not in South Carolina. There is no doubt that the right to make a will gives the right to dispose of testator's personal property wherever it may be situated, but before there is a will at all, there must be conformity to the law of the domicile which, in most of the States, requires that the will must be in writing—free and voluntary—attested by a certain number of witnesses, and proved in an office established for that purpose. Although the power of disposal may be general, the sanction of these local laws, which are necessary to give it effect

---

Opinion of the Court.

---

as a will, does not extend beyond the limits of the State which enacts them.

So also as to the authority of executors, which is a very different matter from the probate of the will. Even after a will has been probated, it cannot execute itself, and some agency must be created to carry it out. The testator has the right to appoint his own executors, and while undoubtedly their general authority is derived from the will, they cannot enter fully upon the discharge of their trust until they have complied with certain statutory regulations upon the subject, such as taking the prescribed oath, in some of the States giving bond, and receiving letters testamentary; and before these requirements are complied with, an executor named can exercise no power as such further than to pay funeral charges, and perhaps do such other acts as are necessary for the preservation of the estate. These requirements are necessarily local in their nature, and of course their operations are limited to the State which makes them, unless other States, from convenience or comity, adopt them as to wills executed in that State.

The rule and the reasons for it are clearly stated by Chief Justice Marshall, in the case of *Dixon's Executors v. Ramsay's Executors*, 3 *Cranch* 319, as follows: "The question in this case is, whether the executor of a person who dies in a foreign country, can maintain an action in this, by virtue of letters testamentary granted to him in his own country. It is contended that this case differs from that of an administrator, which was formerly decided in this court, because the administrator derives his power over the estate of his intestate from the grant of administration; but an executor derives it from the will of his testator, which has invested him with his whole personal estate, wherever it may be. This distinction does certainly exist; but the consequences deduced from it do not seem to follow. If an executor derived from the will of his testator a power to maintain a suit and obtain a judgment for a debt due to his testator, it would seem reasonable that he should exercise that power, wherever the authority of the will was acknowledged; but if he maintain the suit by virtue of his letters testamentary, he can only sue in courts to which the power of these letters extends.

---

November Term, 1882.

---

It is not and cannot be denied, that he sues by virtue of his letters testamentary; and consequently in this particular he comes within the principle which was decided by this court in the case of an administrator. All rights to personal property are admitted to be regulated by the laws of the country in which the testator lived; but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. No one can sue in the courts of any country, whatever his rights may be, unless in conformity with rules prescribed by the laws of that country," &c. See, also, *Murrell v. Dicky*, 1 *John. Ch.* 153; *Peterson v. Chemical Bank*, 32 *N. Y.* 40; *Noonan v. Bradley*, 9 *Wall.* 400, and *Reynolds' Executors v. Torrance*, 2 *Brev.* 49.

It is clear, then, both from principle and authority, that the plaintiffs had no legal capacity to sue in this State by virtue of their letters testamentary granted in the State of Pennsylvania, but it is insisted that the foreign appointment has been confirmed by the law of this State, and therefore they had the right to sue here. This might be possible. As said by Chief Justice Simpson, in the case of *Dial v. Gary*, 14 *S. C.* 579: "If the decedent has left a will, upon its being established under the *lex domicilii*, it will usually be confirmed under the jurisdiction where the property is found, and the title of the executor, as well as the disposition of the property therein appointed and directed, will be recognized here. But this confirmation must take place and be had in accordance with the laws of the *rei site* before even an executor under such testament can intermeddle with the property," &c.

Is there any law in South Carolina which "confirms" the appointment of these executors, and makes them executors in this State? Section 1875 of the general statutes of 1882, relied upon by the plaintiffs and the Circuit judge, provides, that "If a will be regularly proved in any foreign court, an exemplification of such will may be admitted to probate in this State upon the exemplification and certificate of the judge of the Court of Probate, and the exemplification shall also be evidence of the devise of lands in this State when the title of lands comes in question," &c. The object of this provision manifestly was to avoid the

---

Opinion of the Court.

---

great inconvenience of producing the original will in this State for the purpose of being used in evidence, as appears by the original act of 1759 (4 Stat. 102), which recites, that "said probate or copy so proved and attested as aforesaid, shall be deemed and held to be as good and sufficient evidence in any court of law or equity in this Province as if said original will had been produced," &c. It may be conceded that under this law the will of Robert Patterson has been admitted to probate in Fairfield county of this State, but no mention whatever is made as to the qualification of the executors, and, as we understand it, the probate did not *ipso facto* involve their appointment or the confirmation of the foreign appointment in this State, so as to enable them to sue here.

The qualification of the executors is a matter entirely separate and distinct from the probate of the will and supplemental thereto. The oath required of executors in Pennsylvania is not identical with that required of them in this State. Section 1882 of the general statutes requires that every executor, at the time of proving the will, shall take the oath there prescribed, "that the writing contains the last will of the deceased so far as he knows or believes, and that he will well and truly execute the same, by paying first the debts and then the legacies contained in the said will, so far as his goods and chattels will thereunto extend and the law charge him; and that he will make a true and perfect inventory of all such goods and chattels," &c. These plaintiffs never took this oath or received letters testamentary in this State, and as was said in *Reynolds v. Torrance, supra*: "The opinion of the court is, that the authority derived from the probate of a will and letters testamentary in another of the United States, will not extend to this so as to empower the executor to meddle with the effects or credit of the deceased within this State. \* \* \* An authenticated copy of a will and probate coming from another State, may be received in this, as sufficient evidence of such will and probate, but will not authorize the executor, acting by virtue of letters granted in another State, to meddle with property in this State, without first applying for and obtaining letters testamentary in this State, because the ordinaries [judges of Pro-

---

November Term, 1882.

---

bate] within their several precincts, are bound to see to the due application of the assets of persons deceased and ought to have a correcting power over those entrusted with the administration of such assets, for the safety and interest of creditors and others within this State."

It is the judgment of this court that the judgment of the Circuit Court be reversed.

---

COLEMAN v. DUNLAP.

1. A holder of a note secured by a mortgage of indemnity, with a written assignment to him from the mortgagor endorsed on the mortgage, may not testify to his purchase of the note from the mortgagor, who at the time of trial is deceased, but may testify that he is the owner of the note; and this will be sufficient to sustain the action against the representative of the deceased.
2. This mortgagor was the endorser of the note, and at maturity had waived protest and paid off the note, and afterwards re-issued it. *Held*, under the proof, that the holder could recover from such endorser.
3. Notice of non-payment by the principal was probably rendered unnecessary by the taking for indemnity of a mortgage of property nearly equal in value to the amount of the debt.
4. If reasonable notice was necessary, a suit by the assignee for foreclosure of the mortgage, was demand upon the principal and constructive notice to the endorser.
5. The re-issue of the note for value after dishonor, without the endorsement erased, made the endorser liable as the drawer of a new bill, and demand upon the maker of the note and notice of non-payment were unnecessary.

---

Before COTHRAN, J., Laurens, June, 1882.

The opinion states the case. The Circuit decree was as follows:

I agree with the master in his findings of facts; also in his rulings upon section 415 of the code; also, that Dunlap, the endorser, upon taking up the note, was invested with the rights of the bank to enforce payment from Fuller, and that the transfer of the note by Dunlap to the plaintiff, for value, was a re-issue of it, with a revival of his liability as endorser.



---

Circuit Decree.

---

I cannot, however, agree with the master, that it was necessary for the plaintiff to show that he had pursued the maker (James Fuller) to insolvency. R. S. Dunlap was not a guarantor of the note; his liability upon re-issuing the note was certainly as high as that of a surety, if, indeed, it did not become the unqualified liability of the maker of a new note; and in either event, the plaintiff had the right to demand payment of Dunlap alone, if he chose to do so. Dunlap, as has been already said, transferred the note to the plaintiff, after it was due, and for value, and by neglecting to erase his name from it, which he had the unquestionable right to do before parting with it, he gave to the note renewed currency, certainly with revived (and I am inclined to hold with unqualified) liability on his part.

What may have been the real intention of the parties in the matter of the transfer can never be known. Death has sealed the lips of the one, and the rule of evidence those of the other, and in this condition of things the true intention can be gathered only from the law itself which governs the naked and unexplained transaction. Written instruments importing an obligation must be construed most strictly against those who make them. R. S. Dunlap had the right to erase his name from the note. He neglected, it may be purposely declined, to do so. Its remaining there must bind him to the legitimate consequences of his neglect or refusal to erase it, and the most obvious consequence of his act is liability to make good the endorsement.

"It is a well established principle of commercial law, that if the last of several endorsers were to pay the note to his endorser, he could re-issue the note with or without his endorsement remaining upon it, and recovery could be had under this second transfer from all prior parties who remain liable to him, and from him also, if his endorsement were upon the instrument." 2 *Dan. Neg. Inst.*, § 1238. "If an endorser who pays a bill re-issues it, he is bound by his first or second endorsement according to intention; if as one already fixed, he need not have notice." *Id.*, § 1242. "If the acceptor retire a bill, he takes it out of circulation, the bill is paid; but if an endorser retire it, he only withdraws it from circulation so far as he is concerned." *Id.*, § 1243.

---

November Term, 1882.

---

Wherefore it is ordered and adjudged, that the exceptions to the master's report be sustained; that the appeal to this court be dismissed; and that the decree of the trial justice be affirmed. It is further ordered, that the plaintiff have judgment for his costs against the defendant.

*Messrs. Ball & Watts*, for appellant.

*Mr. B. D. Cuninghame*, contra.

March 6th, 1883. The opinion of the court was delivered by

MR. JUSTICE MCGOWAN. On May 22d, 1875, James Fuller made his promissory note for \$125, payable to one R. S. Dunlap, at the bank of Newberry, five months after date. Dunlap endorsed the note in blank, and, upon receiving the note, the bank paid the money to Fuller, the maker, who, in order to secure Dunlap, his endorser, executed and delivered to him a chattel mortgage of a mule valued at \$120. When the note fell due, October 25th following, Dunlap, waiving protest in writing over his signature, took up the note and some time afterwards formally assigned the mortgage of the mule to the plaintiff Coleman, and doubtless transferred to him at the same time for value the note, although there is no formal assignment upon it as on the mortgage. The mule was sold by the plaintiff under legal proceedings, and the proceeds applied as a credit on the note, which, with another payment, reduced the note to a small balance, for which he brought this suit before Trial Justice Watts against the administrator of Dunlap, who had died in the meantime.

The trial justice decreed for the plaintiff, and the defendant appealed to the Court of Common Pleas, and the matter was there referred to the master "to hear and determine the issues of law and fact involved," and he dismissed the complaint, saying: "There is no evidence that the balance due upon the note can not be made out of the maker and there is no evidence at all of demand upon him and non-payment and notice thereof to the endorser, which was necessary to make him or his estate liable to the plaintiff. It does not appear that this plaintiff has

## Opinion of the Court.

made any effort whatever to collect the balance due upon the note from the maker. I think, therefore, and recommend that the case should be dismissed with judgment against the plaintiff for all costs of these proceedings," &c.

Exceptions were taken to this report and the Circuit judge reversed it and confirmed the judgment of the trial justice for the plaintiff. From this judgment the defendant appeals to this court upon two grounds :

"1. That his Honor erred in holding that the plaintiff was the owner of the note sued on. 2. That he erred in holding that the defendant's intestate was liable therefor."

The plaintiff had possession of the note as well as the mortgage, which latter had been regularly assigned to him by Dunlap, and which he enforced by having the mule sold, and crediting the proceeds upon the note. Coleman testified that he "was the owner of the note; bought it from R. S. Dunlap and paid him the money for it," &c. As Dunlap was dead at that time, it was not competent for Coleman to testify as to "transactions" had with him in his life-time, but we see no reason why he could not state that "he was the owner of the note," and that was all that was necessary to sustain the action, especially as he had possession of both the note and mortgage, which itself was *prima facie* evidence of ownership.

Being the owner of the note, having upon it the blank endorsement of Dunlap, with waiver of protest, is there any reason why Coleman cannot recover upon it against the administrator of Dunlap, the endorser, from whom he received it, without exhausting James Fuller, the maker of the note? When delivered to Coleman, the obligation was either on the old note endorsed by Dunlap with waiver of protest, or on a new bill drawn by him in favor of Coleman, and in either case we think that the holder could recover the balance of the note from the estate of Dunlap, upon the proof made.

In the view that Dunlap still remained endorser after he paid the bank and re-issued the note, he was the endorser of a note past due for value. Notice of protest was expressly waived in writing, on the paper itself, but if that could not refer to the revived liability made after the paper was due, all the notice that

---

November Term, 1882.

---

Dunlap could require was reasonable notice of non-payment, and probably even that was rendered unnecessary by his taking a mortgage, for his indemnity from the maker, of property nearly equal in value to the amount of the debt. See *Barrett v. Charleston Bank*, 2 *McM.* 194, where Judge Evans, in speaking for the court, says: "It seems to me that Barrett, having taken what he considered ample security against his liability on his endorsement, and in the absence of any proof to the contrary, we must suppose it an ample security, has waived his right to insist on notice of non-payment by the maker," &c.

But if there was no waiver as to the balance of the debt, which remained after the proceeds arising from the sale of the mule was applied, the assignment of that mortgage to the plaintiff, and his suing the maker, Fuller, to foreclose the mortgage, was at least constructive notice of non-payment. "In the case of negotiable notes transferred after due and guaranteed by the endorser, demand of payment from the maker and notice to the endorser, either actual or constructive, within a reasonable time, must be proved. The bringing of suit on the note against the maker, is a sufficient demand, and, if known to the endorser, would be sufficient notice." *Benton v. Gibson*, 1 *Hill* 56.

But we incline to the view that the circumstances make this one of the cases in which the endorser is held to be the drawer of a new bill, and that demand upon the maker and notice of non-payment to the endorser were not necessary. The endorser took up the note from the bank and re-issued it for value. He might have stricken out his own name on the back, but he did not do so, and he probably left it there to give the note value. "It is a well established principle of commercial law, that if the last of several endorsers were to pay the note to his endorser, he could re-issue the note with or without his endorsement remaining upon it, and recovery could be had under this second transfer from all prior parties who remain liable to him, and from him also if his endorsement were upon the instrument." 2 *Dan. Neg. Inst.*, § 1238.

It was said by Judge O'Neill, in the case of *Gray v. Bell*, 3 *Rich.* 72: "According to our cases of *Eccles v. Ballard*, 2 *McCord* 388; *Barratt v. May*, 2 *Bail.* 1; *Benton v. Gibson*, 1

---

Opinion of the Court.

---

*Hill* 56, the endorser of a note after due is to be regarded either as the guarantor of its payment or as the drawer of a new bill. Both stand upon the same principles, and it is hardly necessary to distinguish in what precise character he is to be charged. I am prepared, however, to go much farther and to hold that the endorser of a note negotiable after due, is to be regarded either as a new maker, or as the drawer of a bill on a man without funds (the maker who has failed to pay), in neither of which cases is demand of payment or notice at all necessary."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

## NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full.

---

No. 1275. **Ayer v. Chassereau.** April Term, 1882. This was a motion to dismiss an appeal from an order of Judge Hudson, refusing leave to defendant to file his answer, because unverified, and giving plaintiff a judgment by default. The motion here was based upon the ground that defendant had no right of appeal. *Held*, that the order of the Circuit judge involved a legal right and was, therefore, appealable under section 11 of the code of procedure. Motion refused. Order PER CURIAM, October 6th, 1882.

No. 1276. **The State, ex relatione County Commissioners of Abbeville County, v. County Commissioners of Edgefield County.** April Term, 1882. This was a petition presented to the court in behalf of the relators to require the respondents to levy a tax upon the property within certain limits of Edgefield county, and to pay the proceeds into the hands of the county treasurer of Edgefield, to be held subject to the order of relators; and for damages and costs. The facts stated in the petition were admitted by the respondents, and legal issues only were raised by the return. This application was based upon the act of 1880 (17 Stat. 412), which authorized the citizens of a designated section of Edgefield county, adjoining the county of Abbeville, to fence in their territory, and which extended to such territory the provisions of the stock law then in force as to Abbeville and other counties. 16 Stat. 689. For the purpose of keeping this fence in repair, the county commissioners of Edgefield were to procure from the county commissioners of Abbeville the per centum annually levied as a tax in Abbeville for keeping fences in repair, and to levy upon the

property within the said territory of Edgefield the same tax, and not to exceed such per centum of Abbeville, and the proceeds of such tax to place in the hands of their county treasurer, subject to the order of the county commissioners of Abbeville. *Held—*

1. That the necessary inference was that the duty of keeping this fence in repair was charged upon the county commissioners of Abbeville county; that the fence was not for the benefit of Edgefield county, and the tax was not a county tax, but the proportion properly chargeable upon that territory of Edgefield which, at their own request, was included within the benefits enjoyed by the county of Abbeville, and none of the rights or powers given by the constitution to the county commissioners of Edgefield were delegated to the county commissioners of Abbeville.

2. That this was not a claim against the county of Edgefield, and therefore to be audited, but an application to require the county commissioners of that county to perform a specific duty imposed upon them by an act of the legislature.

3. That the duty to be performed by the county commissioners of Edgefield did not involve the exercise of judgment or discretion, but was purely ministerial, and therefore enforceable by *mandamus*.

4. The relators are entitled to neither damages nor costs. *State, ex rel. Bull, v. County Treasurer*, 10 S. C. 40.

Petition granted, except as to damages and costs, and writ ordered. OPINION by MR. JUSTICE McIVER, October 7th, 1882. *T. P. Cothran*, for relators. *B. W. Bettis, F. H. Wardlaw*, contra.

No. 1277. **Charles v. Jacobs.** April Term, 1882. Money was, in the hands of the sheriff, realized from the sale of lands of C., under an execution of A., as administrator of B., against the executrix of C. D. held an execution against A., as administrator of B., and, claiming this money, took out a rule against the sheriff, entitled *A., as administrator of B., v. Executrix of C.*, requiring him to show cause why he did not apply this money to D.'s execution. The sheriff made return that the money was claimed by A., as administrator of B., as applicable to expenses

of his administration, including counsel fees. Judge Kershaw decided that the money was applicable to expenses of the administration and to such counsel fee as should be allowed by the Probate Court, and discharged the rule. The Probate judge made report of a proper counsel fee, and added that the estate of B. had not been finally settled, and that there were other costs and expenses of administration unpaid. On hearing this report, which was entitled *D. v. A., as administrator of B.*, Judge Fraser, not knowing of Judge Kershaw's order, directed the counsel fee to be paid and the balance paid to D. *Held*, that Judge Fraser's order was in part inconsistent with Judge Kershaw's, and, therefore, to that extent, erroneous, one Circuit judge having no power to reverse a judgment of another Circuit judge. *Held, further*, that Judge Kershaw's order was right: money received by a sheriff on an execution in favor of an administrator, not being applicable to an execution in the office upon a judgment obtained against the administrator after the death of intestate, especially where prior claims against the estate remain unpaid. This case, therefore, differs from *Haynsworth v. Frierson*, 11 Rich. 476. Appeal sustained. OPINION by MR. JUSTICE McIVER, October 7th, 1882. *G. G. Wells, T. H. Cooke*, for appellant. *W. E. Earle*, contra.

No. 1278. **Cleveland v. Cohrs.** April Term, 1882. This was an appeal from a decree of foreclosure and sale passed by Judge Kershaw. The case has twice before been heard on appeal in this court, and will be found reported in 10 *S. C.* 224 and 13 *Id.* 397. The following points were here decided:

1. A finding by the Circuit judge, from written testimony reported to him, that a bond had not been paid, sustained.

2. Where a mortgagee purchases the mortgaged property at a foreclosure sale, for less than the amount due, the mortgage debt is not thereby extinguished; and the mortgagee is the purchaser where she receives titles from the master under a transfer of the highest bidder's bid.

3. The judgment under which such sale was made having been set aside by this court, on the motion of the mortgagor, he cannot now claim any benefit from a sale made under such annulled judgment. The effect of such reversal upon a stranger



purchaser not considered. Judgment affirmed. OPINION by MR. JUSTICE McIVER, October 7th, 1882. *McCrady & Sons*, for appellant. *Campbell & Whaley*, contra.

No. 1279. **Christopher v. Christopher.** April Term, 1882. This was an action by plaintiff, a freedwoman, against defendant, a freedman, for support and maintenance, the plaintiff alleging that defendant had deserted her. The answer denied the marriage. The cause was heard before Kershaw, J., who referred the issues to a jury, and upon their finding favorable to the plaintiff, gave judgment for the payment of a certain sum of money, annually, by defendant to plaintiff. Defendant appealed. *Held—*

1. In charging the jury that if defendant was not married to plaintiff, or any other woman of color, under the terms of the act of 1865 (13 *Stat.* 290), and was living with plaintiff as husband and wife on March 12th, 1872, and in any way they so recognized each other, that this would make them man and wife under the terms of the act that day approved, the Circuit judge correctly stated the terms and operation of the act of 1872 (15 *Stat.* 183).

2. A finding of fact by jury and judge sustained.

3. A wife may file a complaint against her husband for support and maintenance, as a distinct, substantive relief.

4. The form of the verdict was of no consequence, as the judgment was rendered by the court; and where answer is put in, the judgment is not necessarily limited by the prayer for relief, but the court may grant "any relief consistent with the case made by the complaint and embraced within the issue." *Code*, § 299; *Pom. Rem.*, § 580. Judgment affirmed. OPINION by MR. JUSTICE McIVER, October 7th, 1882. *W. M. Thomas*, for appellant. *Wright & Polite*, contra.

No. 1287. **Miller v. Edwards.** April Term, 1882. This case involved the same points as those decided in *Miller v. Hall*, ante 141, and they were similarly decided, the Chief Justice dissenting. The two cases were heard together by referees, Circuit judge and this court. The following points were also decided here:

1. The condition of the bond differing slightly from the aggregate of the three installments, and both of these differing from the price of the land, as ascertained by multiplying the number of acres by the price per acre, the Circuit judge committed no error in construing the bond and agreement together, and thus ascertaining the true amount of the debt.

2. The referees erred in receiving parol testimony on the subject of the interest agreed to be paid, but as the Circuit judge did not base his conclusions upon such testimony, this furnishes no ground for remanding the case. Judgment affirmed. OPINION by MR. JUSTICE FRASER (sitting in the place of Mr. Justice McGowan), October 21st, 1882. *E. G. Graydon*, for appellant. *W. H. Parker*, contra.

No. 1289. **Foot & Son v. Williams.** April Term, 1882. This case was commenced in a trial justice's court, and judgment rendered for plaintiff March 25th, 1881. Defendant's attorney at that time gave verbal notice of appeal, and prepared written notice and grounds of appeal and handed them to his clerk to be served on both the attorney for plaintiffs and the trial justice. The clerk served this notice upon plaintiffs' attorney within the five days but failed to serve the trial justice. On December 21st, 1881, a written notice of appeal was served upon the trial justice, who signed a certificate that a verbal notice of such intention had been served upon him by defendant's attorney on or about March 30th. Judge Pressley dismissed the appeal because not perfected within the time required by law. This court sustained the ruling below upon the authority of the code of procedure, sections 370, 371, 353. Cases cited, *Davis v. Vaughan*, 7 S. C. 343; *Scott v. Pratt*, 9 S. C. 83; *Russell & Co. v. Follin*, MS. Dec. No. 799, January 8th, 1880. The act of 1880, 17 Stat. 368, has no application to an appeal from a trial justice, and, even if it did, could not remedy the defect here. OPINION by MR. JUSTICE MCGOWAN, October 21st, 1882. *O. L. Schumpert*, for appellant. *F. Werber, Jr.*, contra.

No. 1298. **Symmes v. Symmes.** April Term, 1882.

1. A refusal to continue or recommit a case is not appealable. "These are matters of administration which arise in the pro-

gress of a cause, and must from the necessity of the case be left to the prudent and wise discretion of the Circuit judge."

2. A matter involved in a cause and finally disposed of by a circuit decree, from which no appeal is taken, becomes *res adjudicata*, and cannot be again stirred in the further progress of the cause. Judgment of Fraser, J., affirmed. OPINION by MR. JUSTICE MCGOWAN, November 14th, 1882. *E. F. Stokes*, for appellant. *T. Q. Donaldson, M. F. Ansel*, contra.

No. 1306. **Whaley v. Houser.** April Term, 1882.

1. A finding of fact by referee, overruled by the Circuit judge, sustained.

2. A matter material to the issues and not passed upon below, left open for further investigation.

3. One not a party to the cause, even if examined as a witness at the hearing, is not bound by a judgment therein. Circuit decree of Mackey, J., reversed. OPINION by MR. JUSTICE MCGOWAN, November 27th, 1882. *Glover & Glover, Izlar & Dibble*, for appellant. *J. D. Pope, Rion & Barron*, contra.

No. 1307. **Christian v. Lebeschultz.** April Term, 1882. *A cestui que trust* brought action against her nominated trustee (who declined to serve) and her infant children, who were also beneficiaries under the trust deed, for the purpose of having a trustee appointed, and for a sale of the trust property and a re-investment of the proceeds. Under this proceeding, a new trustee was appointed and directed to sell the land held in trust, which he did. The papers were all entitled the "Court of Common Pleas," and were regular in all respects, except that the case nowhere appeared upon the dockets of the court, the records were not filed in the clerk's office until after this action was brought, and the Circuit decree bore date at a time when the court for that county was not in session. The mother died, and this action was instituted by her children against the purchaser for possession of the land and rents and profits. The complaint was dismissed by Judge Aldrich, and plaintiffs appealed. *Held—*

1. That the objection to the introduction of the decree in the former action upon the ground that it did not appear upon its face that the court had jurisdiction, was not well taken.

2. If such decree had been passed at chambers it would have been invalid, but in the absence of all testimony (except as above stated) it must be assumed that the cause was heard in open court. The failure to file the decree did not affect its validity.

3. Unless it is manifest that some surprise has been taken or injustice worked, the admission by the Circuit judge of further testimony after the parties had announced that they had closed their evidence and the argument had commenced, is within his discretion and will not be disturbed. **OPINION** by MR. CHIEF JUSTICE SIMPSON, November 29th, 1882. *Glover & Abney*, for appellant. *J. C. Sheppard*, contra.

**No. 1310. The State, ex relatione Williams, v. Sims.** November Term, 1882. This was an order dismissing an application for a writ of *mandamus* to require the State board of canvassers to canvass the votes and declare the election of the relator as clerk of the court for Edgefield county. The case is identical with that of *State, ex rel. Anderson, v. Sims*, ante 460, and the opinion in this case simply refers to the decision in that. Order **PER CURIAM**, December 2d, 1882. *Butler & Simkins*, for relator. *Youmans*, attorney general, contra.

**No. 1319. Ex parte Blake.** November Term, 1882. This was a petition by Julius A. Blake and others for a rehearing of the case of *Annely v. DeSaussure*, 17 S. C. 389, based principally upon the ground that the opinion of Chief Justice Willard, in 12 S. C. 488, was the judgment of the court upon all the points therein discussed. The court held that so far as the question of improvements was concerned, there was no concurrence by the associate justices with the views of the then Chief Justice. Petition refused. Order **PER CURIAM**, January 24th, 1883. *Campbell & Whaley*, for petitioners.

**No. 1322. State v. Sims.** November Term, 1882. Application to reduce bail, upon the affidavit of the prosecutrix, who was the wife of the prisoner. Application refused, the facts stated in the original affidavit upon which the warrant was issued, not being denied. **PER CURIAM**, January 27th, 1882. *D. Johnson, Jr.*, for petitioner. *Gantt*, solicitor, contra.

No. 1335. **Simonds v. Haithcock.** November Term, 1882. Action by plaintiff against defendant, for damages caused by the erection of a dam, and for injunction against its maintenance, tried by WALLACE, J. The right of plaintiff and the question of damages were referred to a jury. Defendant offered to prove a parol license from a former tenant at will of the injured land; upon objection, the presiding judge refused to admit the testimony, and there being no evidence of defendant's right to flood the plaintiff's land, he charged the jury that their verdict must be for plaintiff. The jury found for plaintiff without damages, and the judge then signed an order enjoining the defendant from longer maintaining the dam. Defendant appealed. *Held*, that in the refusal of the testimony offered, in the charge to the jury, and in the order of injunction, the Circuit judge committed no error; that as to the order of injunction, the facts of this case brought it within the rule laid down in *Ad. Eq.* \*210, \*217, \*218; *Bird v. Railroad Company*, 8 *Rich. Eq.* 54; *Klinck v. Black*, 14 *S. C.* 246. OPINION by MR. JUSTICE MCGOWAN, February 15th, 1883. *U. R. Brooks, John Bauskett*, for appellant. *W. H. Lyles*, contra.

No. 1336. **Johnson v. Harrelson.** November Term, 1882. Where parties in possession of land, under claim of title, make improvements upon such land after action brought against them for the possession of the land and denying their right thereto, they have no right to the value of the improvements so erected. The principles discussed upon which tenants in possession are allowed their improvements. OPINION by MR. CHIEF JUSTICE SIMPSON, February 15th, 1883. *C. D. Evans*, for appellant.

No. 1337. **Long v. Schmidt.** November Term, 1882. Action against defendant, a married woman, as acceptor of a bill of exchange. The complaint alleged that defendant, "by her husband, accepted the draft in writing." Defendant demurred, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the Circuit Court (Wallace, J.,) and defendant appealed. *Held*—

1. A married woman can be sued on her own contracts.
2. That the authority to accept was substantially involved in

the allegation of the fact of acceptance. Judgment affirmed. OPINION by MR. JUSTICE MCGOWAN, February 15th, 1883. *A. B. Sawyer*, for appellant. *J. M. McMaster*, contra.

No. 1339. **State v. Williams.** November Term, 1883. A failure to charge propositions of law which were not requested cannot be assigned as error on the part of the Circuit judge. Moreover, the judge's charge here was in accordance with the law as claimed by appellant in his exceptions. Judgment of the Circuit Court (Kershaw, J.,) affirmed. OPINION by MR. CHIEF JUSTICE SIMPSON, February 15th, 1883. *G. T. Graham*, *Meetze & Muller*, for appellant. *Bonham*, solicitor, contra.

No. 1340. **Ross v. Linder.** November Term, 1882. This was an action on a contract for the payment of board. By consent, the case was referred to a referee to hear and determine all the issues, and report the same to the court with his recommendations. He reported in favor of plaintiff. On defendant's exceptions, the Circuit judge (Fraser) dismissed the complaint, upon the ground that the evidence did not support any contract, or, if any, that it was a joint contract made by defendant and the wife of the plaintiff, and that the action must be brought jointly against those two. On appeal. *Held*—

1. That the case being strictly a law case tried by the court, findings of fact by the Circuit judge cannot be disturbed by this court. In this connection the court say: "A question might arise in such case whether a Circuit judge could do more than apply the law to the facts as found by the referee—whether the referee has not been substituted for the jury, his finding being in the nature of a special verdict, with the power on the part of the Circuit judge to hear a motion for a new trial as in ordinary cases of jury trial, or to pronounce judgment as the law might demand. But these questions are not raised. In fact, the consent to the reference may in this case preclude them, as that consent embraced the condition that the referee should report his findings, with his recommendations, to the court, thereby, impliedly at least, agreeing that the court should be the final arbiter below."

2. The contract being joint, the dismissal of the complaint followed as a necessary consequence. The objection of a want of parties could not be taken by demurrer, for the defect of parties did not appear on the face of the complaint, nor was it necessary by answer to do more than meet the case stated in the complaint. Judgment affirmed. OPINION by MR. CHIEF JUSTICE SIMPSON, February 15th, 1883. *Bobo & Carlisle*, for appellant. *J. S. R. Thomson*, contra.

No. 1350. **Kibler v. Luther.** November Term, 1882. Plaintiff conveyed a strip of land for valuable consideration to a municipal corporation, with a warranty in words following, to wit: "and I hereby bind myself, &c., to warrant and forever defend all and singular the said premises unto the said intendant and wardens, and their successors in office, as public lands, not to be occupied by any building or obstruction of any kind, but to be kept open at all times for the use of the public," &c. Plaintiff brought this action alleging that defendant had built upon and now occupied a portion of said land, and demanded its possession and damages. A demurrer that the complaint did not state facts sufficient to constitute a cause of action, and that there was a defect of parties defendant, the town council of the corporation, was sustained by the Circuit Court (Pressley, J.) Plaintiff appealed. *Held*—

1. That the concluding words of the warranty imposed a duty upon the town, but it was doubtful whether they created a condition, but, if a condition, the grantor could not maintain an action for the land until he had made entry upon it after condition broken, or made claim, if entry was impossible. *Hammond v. Railroad Company*, 15 S. C. 34.

2. The town council was a necessary party. Judgment affirmed. OPINION by MR. JUSTICE MCGOWAN, March 6th, 1883. *Moorman & Simkins*, for appellant. *Geo. Johnstone*, contra.

No. 1351. **McGrath & Byrum v. Barnes.** November Term, 1882. Action on note stated in the complaint and admitted in the answer. The defense was, that the note was a mere memorandum given under a certain agreement, and testi-

mony was introduced to prove this agreement. This was held error on a previous appeal in this case, reported 13 *S. C.* 328. At the second trial, without any amendment of the pleadings, defendant offered to prove that the account for which the note was given contained overcharges, and that there was nothing due thereon when this note was given. The presiding judge (Aldrich) ruled that this testimony was incompetent. *Held*, that this ruling was correct, the testimony offered not being pertinent to any issue raised in the pleadings. *OPINION* by MR. CHIEF JUSTICE SIMPSON, March 6th, 1883. *Moore and Murray & Murray*, for appellant. *Harrison & Broyles*, contra. Mr. Justice McGowan, having been of counsel, did not sit.

No. 1352. **Foster v. Fowler.** November Term, 1882.

1. A finding of fact by referee and Circuit judge approved.

2. If a wife, prior to 1868, waived her equity in favor of her husband, the proceeds of the sale of her inheritance paid to him would be a good payment, and such waiver established by the circumstances in this case. Judgment of the Circuit Court (Pressley, J.,) affirmed. *OPINION* by MR. JUSTICE MCGOWAN, March 6th, 1883. *J. W. Ferguson*, for appellant. *Holmes & Simpson*, contra.

No. 1355. **Jowers v. Stansell.** November Term, 1882. Order of Judge Hudson refusing a motion for non-suit in action for trespass upon land, not disturbed, there being evidence of possession, both actual and constructive, by plaintiff, and of defendant's trespass, and the verdict being for plaintiff. *OPINION* by MR. CHIEF JUSTICE SIMPSON, March 8th, 1883. *H. M. Thompson*, for appellant. *Robert Aldrich*, contra.





# INDEX.

## ACTIONS.

1. National Bank of another State may be sued here. *Holmes & Durham v. Bank*, 1, 31
2. In such action, attachment may issue before judgment. *Id.* 2, 31
3. Legal and equitable issues must be separately tried Code makes no change as to distinction between law and equity, except as to forms of action. *Chapman v. Lipscomb*, 4, 5, 222
4. Action by informer to recover money lost at play, must state that the loss was at one time or sitting. *Trumbo v. Finley*, 1, 305
5. On clerk's bond may be brought in the name of the State, and objection can be raised only by demurrer. *State v. Moses*, 1, 366
6. Against married woman as surety need not state that she has a separate estate. *Id.* 2, 367
7. When a cause of action exists. Unless shown by complaint, it will be dismissed on demurrer, as in this case. *Chalmers v. Glenn*, 1, 2, 469
8. Against master for specific performance, refused here, terms not being complied with on day of sale. *Davis v. McDuffie*, 2, 495
9. Action for error in settlement of sealed note, is legal and not equitable. *McMakin v. Gowan*, 2, 502
10. Wife may claim support from husband as distinct relief. *Christopher v. Christopher*, 3, 600
11. Contract being joint, action against one properly dismissed. *Ross v. Linder*, 605

## ADMINISTRATION.

See EXECUTORS.

## ADVERSE POSSESSION.

- A beneficiary accepting under a will cannot claim adversely to a devise in such will. *Witherspoon v. Watts*, 7, 397

## AGENT.

- Complaint sufficiently charges acceptance of draft in stating acceptance by agent. *Long v. Schmidt*, 2, 604

## AGRICULTURAL LIEN.

See LIENS.

## APPEALS.

1. Finding of fact by Circuit judge sustained. *Wilson v. Babb*, 4, 59  
*Hyatt v. McBurney*, 3, 199  
*Earle v. Harrison*, 1, 329  
*Witherspoon v. Watts*, 6, 397  
*Cleveland v. Cohrs*, 599
2. Finding of fact by Circuit judge overruled. *Ex parte Carolina Nat. Bank*, 1, 289
3. Finding of fact by referee and Circuit judge affirmed. *Tompkins v. Tompkins*, 7, 2  
*Miller v. Hall*, 1, 141  
*Hirshkind & Co. v. Israel*, 1, 157  
*Williams v. Walker*, 1, 577  
*Foster v. Fowler*, 1, 607
4. Referee sustained and Circuit judge reversed. *Tompkins v. Tompkins*, 19, 3  
*Koon v. Munro*, 3, 374  
*Whaley v. Houser*, 2, 602
5. Finding of fact by Probate and Circuit judges approved. *Gunter v. Gunter*, 1, 193

6. Finding of fact by jury in Chancery and Circuit judge approved. *Christopher v. Christopher*, 2, 600
7. Omission by referee and judge corrected. *Tompkins v. Tompkins*, 20, 3
8. Matter not passed upon on Circuit sent back for investigation. *Whaley v. Houser*, 2, 602
9. General exception not considered. *State v. Turner*, 1, 103
10. Order refusing non-suit not disturbed, no error of law appearing. *Sharp v. Kinsman*, 1, 108
11. Error in charge immaterial, jury being told not to consider that matter. *Id.* 2, 108
12. Exceptions by reference to former exceptions not sufficient. *Chapman v. Lepscomb*, 1, 222
13. This court cannot review findings of fact by referee and judge in law case. *Id.* 3, 222
14. Not even if equitable defense is asserted. In such case, issues must be separately tried. *Id.* 4, 222
15. Exceptions to incompetent testimony before master not before this court, no exceptions being taken to the Circuit decree. *Id.* 9, 223
16. This court cannot interfere with judge's rejection of a juror. *Gunter v. Graniteville Man. Co.*, 4, 263
17. Errors of judge as to right of recovery only and not affecting measure of damages, not to be considered on plaintiff's appeal after verdict for him. *Lasure v. Graniteville Man. Co.*, 1, 275
18. Decree different from what was intended reversed. *Graves v. Spoon*, 1, 386
19. Rule by purchaser on master to require deed being discharged, only further remedy was appeal. *Davis v. McDuffie*, 3, 495
20. Refusal to charge no error unless request is shown. Brief must show errors complained of. *Sawyer v. Macaulay*, 1, 2, 543
21. Fragment of charge cannot be held erroneous. *Id.* 5, 543
22. Order refusing non-suit sustained, verdict being for plaintiff. *Gilmore v. Roberts*, 2, 551
23. Question not shown to have been raised on Circuit, cannot be considered, but rule relaxed here. *Kaminer v. Hope*, 1, 561
24. Order refusing leave to file answer, and giving judgment by default, is appealable. *Ayer v. Chassereau*, 597
25. Verbal notice to trial justice insufficient. *Foot v. Williams*, 601
26. Judge erred in receiving parol testimony as to interest, but his judgment not being based thereon, new trial not granted. *Miller v. Edwards*, 2, 600
27. Refusal to continue or recommit not appealable. *Symmes v. Symmes*, 1, 601
28. Error cannot be assigned of a failure to charge propositions not requested. *State v. Williams*, 605
29. Findings of fact by the judge in a law case cannot be disturbed. *Ross v. Linder*, 1, 605

#### ATTACHMENTS.

- May issue in action against national bank before judgment. *Holmes & Durham v. Bank*, 2, 31

#### BAIL.

- Application to reduce bail refused, statements in original affidavit not being denied. *State v. Sims*, 603

#### BASTARDY.

1. A child born in wedlock presumed to be legitimate, even where within five months after marriage. But in latter case, less proof is required to rebut presumption. *Wilson v. Babb*, 1, 59

2. Any competent testimony is admissible on this point, and, if it convinces, is sufficient. *Id.* 2, 59

3. Impotency, &c., not the only facts sufficient to satisfy. *Id.* 3, 59

BETTERMENTS.

See IMPROVEMENTS.

BILLS AND NOTES.

See CONTRACTS; NEGOTIABLE INSTRUMENTS.

BURGLARY.

See CRIMINAL LAW, 6.

CASES CRITICISED.

1. *Annely v. DeSaussure*, 17 *S. C.* 389, affirmed. *Ex parte Blake*, 603

2. *City Council v. Corleis*, 2 *Bail.* 186, distinguished. *State v. Mancke*, 2, 81

3. *Daniel v. Swarengen*, 6 *S. C.* 304, recognized and followed. *Huff v. Watkins*, 2, 510

4. *Davenport v. Caldwell*, 10 *S. C.* 317, affirmed. *Herndon v. Moore*, 1, 339

5. *Dillard v. Brian*, 5 *Rich.* 502, recognized and followed. *Tobin v. Myers*, 2, 324

6. *Ex parte Brown and wife*, 15 *S. C.* 518, considered and declared. *Ex parte Brown and wife*, 2, 87

7. Same case, recognized and followed. *Ex parte Carolina National Bank*, 4, 289

8. Fifty-four Bonds Case, 15 *S. C.* 304, recognized and followed. *Id.* 289

9. Same case, qualified. *Ex parte Benson & Co.*, 5, 38

10. *Gunter v. Graniteville Manufacturing Co.*, 18 *S. C.* 262, approved. *Lasure v. Graniteville Man. Co.*, 5, 276

11. *Haynsworth v. Frierson*, 11 *Rich.* 476, distinguished. *Charles v. Jacobs*, 599

12. *Howze v. Howze*, 2 *S. C.* 229, explained. *Hardin v. Howze*, 1, 73

13. *Koon v. Munro*, 11 *S. C.* 140, explained. *Koon v. Munro*, 1, 374

14. *McCall v. Cohen*, 16 *S. C.* 445, approved. *Abrams v. Carlisle*, 3, 243

15. *McDuffie v. McIntyre*, 11 *S. C.* 551, distinguished. *Hyatt v. McBurney*, 6, 199

16. *McGowan v. Hitt*, 16 *S. C.* 602, overruled. *Suber v. Chandler*, 7, 526

17. *Nance v. Nance*, 1 *S. C.* 218, modified. *Pope v. Mathews*, 2, 444

18. *Robbins v. Slatterly*, *MS. Dec. No.* 712, approved. *Eason v. Miller & Kelly*, 1, 381

19. *Yates v. Gridley*, 16 *S. C.* 496, distinguished. *Davis v. McDuffie*, 3, 495

CHARGING JURIES.

1. Error in charge immaterial, jury being told not to consider that matter. *Sharp v. Kinsman*, 2, 103

2. Charge here was on facts. *Id.* 3, 108

3. Damages are for jury, and judge should not express his opinion. *Id.* 6, 108

4. A request to charge not inconsistent with the general charge, held not to have been refused here. *Gunter v. Graniteville Man. Co.*, 1, 262

5. Errors of judge as to right of recovery only and not affecting measure of damages, not to be considered on plaintiff's appeal, after verdict for him. *Lasure v. Graniteville Man. Co.*, 1, 275

6. Whether there are defects in the master's works, and whether the servant knew of them or not, or could have known of them and con-

tinued in the employment, are questions of fact for the jury. *Lasure v. Granville Man. Co.*, 2, 276

7. Whether admissions of grantor are sufficient evidence is for jury. *Ellen v. Ellen*, 1, 489
8. Refusal to charge no error unless request is shown. Brief must show errors complained of. *Sawyer v. Macaulay*, 1, 2, 543
9. Fragment of charge cannot be held erroneous. *Id.*, 5, 543
10. Error cannot be assigned of a failure to charge propositions not requested. *State v. Williams*, 605

#### CHATTEL MORTGAGES.

See MORTGAGES, 4.

#### CHILDREN.

See BASTARDY.

Posthumous child of intestate is a child left by its father. *Pearson v. Carlton*, 6, 47

#### CLAIM AND DELIVERY.

Cotton covered by rent lien being seized by sheriff after its delivery, he is liable for highest value of the cotton and interest. *Carter v. DuPre*, 3, 179

#### CLERK OF COURT.

1. Clerk and sureties on second bond liable for moneys received during first bond and never deposited or paid out by him as required by law. *State v. Moses*, 3, 367
2. Could not be elected at general election in 1880. *State v. Sims*, 2, 460, 603

#### CODE OF PROCEDURE.\*

1. Makes no changes as to distinction between law and equity, except as

to forms of action. *Chapman v. Lipscomb*, 5, 222

2. Does not dispense with necessity of properly stating a statutory claim. *Trumbo v. Finley*, 312
3. Section 11, final as applicable to Circuit judgment, stated. *Garrison v. Dougherty*, 488
4. Authorizes appeal from order refusing leave to file answer and giving judgment by default. *Ayer v. Chasseeau*, 597
5. Section 96, time for commencing actions, construed. *Nichols v. Briggs*, 480
6. Section 113, action on mistake in settlement barred in six years. *McMakin v. Gowan*, 506
7. Section 113, subdivision 2, and its amendments, as to time for suing on sealed notes, construed. *Nichols v. Briggs*, 480
8. Section 120, time that bars equitable relief, considered. *McMakin v. Gowan*, 2, 502
9. Section 134, real party in interest to sue, considered. *Cuthcart v. Sugheimer*, 131
10. Section 145, substituting defendant, considered. *Patterson v. Pagan*, 587
11. Section 167, subdivision 6, as to oral demurrer, considered. *Trumbo v. Finley*, 314
12. Motion held to be in effect a demurrer. *Davis v. McDuffie*, 499
13. Section 170, demurrer not proper, where basis of it not clearly apparent in complaint. *Patterson v. Pagan*, 587
14. Section 171, what objections not waived by failure to demur, construed. *Davis v. McDuffie*, 499
15. Section 173, as to counter-claims, construed. *Sharp v. Kinsman*, 115  
*Ex parte Carolina Bank*, 297

\* The numbers refer to the sections in the first edition.

16. Section 183, as to irrelevant matter, applied. *Nichols v. Briggs*, 497
17. Section 196 does not require amendment where no cause of action is stated. *Trumbo v. Finley*, 316
18. Sections 288, 289, do not govern motions to set aside a void verdict. *Eason v. Miller*, 2, 381
19. Section 299, relief not limited by prayer, if answer filed. *Christopher v. Christopher*, 4, 600
20. Sections 305, 313, final as applied to Circuit judgments stated. *Garrison v. Dougherty*, 488, 489
21. Section 332, costs in equity causes considered. *Bratton v. Massey*, 560
22. Sections 353, 370, 371, as to appeals, stated. *Foot v. Williams*, 601
23. Section 415, objection to incompetency of witness, must be taken at the trial. *Tompkins v. Tompkins*, 1, 1
24. Construed. *Earle v. Harrison*, 336  
*Coleman v. Dunlap*, 1, 591

#### COMMISSIONS.

See EXECUTORS AND ADMINISTRATORS, 10, 11, 12.

#### COMMON CARRIERS.

See RAILROADS, 1, 2.

#### CONDITIONS.

Words in deed here not a condition that corporation should keep street open, and if so, entry must be made before action brought for forfeiture. *Kibler v. Luther*, 606

#### CONFEDERATE TRANSACTIONS.

1. Merchant's account during the war not scaled. *Tompkins v. Tompkins*, 5, 2
2. Executors not chargeable with confederate securities left by testator. *Id.* 8, 2

3. Debt due one executor not paid by confederate money in the other's hands. *Id.* 9, 2
4. Payment in confederate money to executor discharges ante-bellum debt. *Hyatt v. McBurney*, 5, 199

#### CONSTITUTION.

See HOMESTEAD.

1. Art. I., § 12, not violated by act prohibiting sale of liquor in Chester. *State v. Chester*, 2, 464
2. Art. I., § 19, as to jurisdiction of trial justices, construed. *State v. Padgett*, 319
3. Art. I., § 20, as to homestead, considered. *Bank v. Harbin*, 434
4. Art. II., § 11, time of election of State officers, stated. *State v. Sims*, 462
5. Art. II., § 20, as to subject and title of acts, not violated by local option law. *State v. Chester*, 466
6. Art. II., § 32, homestead provision construed. *Oliver v. White*, 239
7. Considered. *Bank v. Harbin*, 434
8. Art. III., § 22, when act becomes a law, stated. *State v. Mancke*, 85
9. Art. IV., § 18, jurisdiction of General Sessions, construed. *State v. Padgett*, 319
10. Art. IV., § 20, gives no jurisdiction to Probate Courts in partition. *Herndon v. Moore*, 348
11. Art. IV., § 27, term of office of clerk of court, stated. *State v. Sims*, 463
12. Art. XIV., § 8, as to separate property of married women, considered. *Howard v. Henderson*, 191
13. Art. XIV., § 10, did not authorize an election of clerk of court, in 1882. *State v. Sims*, 2, 460

## CONTRACTS.

See DEBTOR AND CREDITOR.

1. Endorser waived protest, paid note and re-issued it. *Held*, that he was liable. *Coleman v. Dunlap*, 2, 591
2. Bond and agreement construed together and the amount of the debt thus ascertained. *Miller v. Edwards*, 1, 600
3. ILLEGAL. Notes indirectly arising out of dealings in futures, not illegal. *Sawyer v. Macaulay*, 4, 543
4. Note and mortgage given in consideration of release from criminal proceeding, illegal. *Williams v. Walker*, 2, 577

## CORPORATIONS.

See MASTER AND SERVANT.

1. When not restrained by statute, may contract just as natural persons do. *Ex parte Benson & Co.*, 2, 38
2. Notes given for stock left with seller as agent of buyer, or as collateral security, have a sufficient consideration. *Kerchner v. Gettys*, 1, 521
3. Entire loss of property of corporation, not a failure of consideration. *Id.* 2, 521
4. Can purchaser of shares deny existence of corporation? *Id.* 3, 521
5. Corporation chartered by one State may do business in another. *Id.* 4, 521
6. Where chartered in another State may do business and elect officers here. *Id.* 5, 521

## COSTS.

1. Widow receiving a share of land, required to pay her own costs in second action for partition by tenants not parties to the first. *Pearson v. Carlton*, 5, 47

2. Decree being reversed, direction therein for costs not appealed from, falls with it. *Bratton v. Massey*, 1, 555
3. Costs in equity, after February, 1880, followed the event of the suit. *Id.* 2, 555
4. Discretion of Circuit judge as to, not disturbed. *Id.* 3, 555
5. None in *mandamus*. *County Commissioners v. Co. Comrs.*, 4, 597

## COUNTIES AND COUNTY CLAIMS.

1. Should audited county claim be enforced by *mandamus* or action? *Wheeler v. Newberry*, 1, 132
2. Commission to ascertain county indebtedness not a court, nor their determination a bar to subsequent action. *Id.* 2, 132
3. Audited claim does not bear interest. *Id.* 3, 132
4. *Mandamus* will not issue to require payment by county treasurer of auditor's check not approved by county commissioners. *State v. Fuller*, 2, 246
5. Fence between two counties to be kept in repair by one, tax may be required to be raised by the other county for its repayment. *County Commissioners v. Co. Comrs.*, 1, 597
6. Duty imposed by legislature is not a claim requiring audit, but a ministerial duty enforceable by *mandamus*. *Id.* 2, 3, 597

## COURTS.

1. Commission to ascertain county indebtedness not a court, nor their determination a bar to subsequent action. *Wheeler v. Newberry*, 2, 132
2. SUPREME. Error to apply to accounting a rule different from that laid down by this court in the case. *Koon v. Munro*, 2, 374

3. GENERAL SESSIONS has jurisdiction in misdemeanors. *State v. Padgett*, 1, 317
4. Has jurisdiction where both fine and imprisonment are imposed. *Id.* 2, 317
5. Warrant of arrest is not assumption of jurisdiction by trial justice. *Id.* 3, 317
6. PROBATE. Legislature cannot authorize partition by. *Herndon v. Moore*, 1, 339  
*Schumpert v. Smith*, 358
7. Partition in, prior to case in 10 S. C. 317, binding. *Id.* 2, 339  
*Schumpert v. Smith*, 358

# CRIMINAL LAW.

1. Act prescribing punishment where not otherwise fixed, applies to prior and subsequent statutes. *State v. Turner*, 5, 103
2. Defense must prove a plea of insanity. Its mere plea does not put burden on the State. *State v. Paulk*, 1, 2, 514
3. Intoxication no excuse for crime. *Id.* 3, 514
4. State having proved *prima facie* case defense must sustain its plea by such proof as will satisfy the jury that offense is not established beyond doubt. *Id.* 4, 514
5. INDICTMENT. Rule where several distinct offenses are charged in one indictment. *State v. Smith*, 149
6. BURGLARY. Statutory, must be charged to have been committed in a house within two hundred yards of the dwelling and appurtenant to it. *State v. Evans*, 1, 137
7. After trial and sentence for the statutory offense, conviction cannot be referred to common law offense. *Id.* 2, 137
8. MANSLAUGHTER. Parties may be guilty of, if present aiding and abetting, and being so charged, they are not charged as accessories, but as principals. *State v. Putman*, 175

9. SALE OF SEED COTTON between sunset and sunrise, meant at night and was sufficiently charged in indictment as "in night of the same day." *State v. Padgett*, 5, 317
10. SELLING LIQUOR. License to sell did not legalize past sales. *State v. Mancke*, 1, 81
11. Grant of license by city without payment of county tax, void. *Id.* 3, 81
12. The three-gallon liquor license act is not now of force, and a sale in the country in any quantity is now unlawful. *State v. Turner*, 2, 3, 103
13. Sale of liquors may be constitutionally prohibited. *Id.* 4, 103

# DAMAGES.

Cotton covered by rent lien being seized by sheriff after its delivery, he is liable for the highest value of the cotton and interest. *Carter v. DuPre*, 3, 179

# DEBTOR AND CREDITOR.

1. Where party was to have half of brick made in payment for laborers furnished, the maker could sell his interest in the brick without regard to his indebtedness to the other party. *Chapman v. Lipscomb*, 8, 223
2. An undelivered due bill held to be evidence of indebtedness, where maker stated that it represented amount of payee's money misapplied by him. *O'Neill v. O'Neill*, 360
3. Notes given for stock left with seller as agent of buyer, or as collateral security, have a sufficient consideration. *Kerchner v. Gettys*, 1, 521
4. Entire loss of property of corporation, not a failure of consideration. *Id.* 2, 521

# DEVISE.

# See WILL.



## DOWER.

1. Of widow renouncing a devise, not primarily chargeable on such devise, but upon all the lands of testator. *Witherspoon v. Watts*, 3, 396
2. Funds of residuum used to pay such dower must be refunded out of the lands. *Id.* 4, 396

## ELECTIONS.

1. Can State canvassers be required by *mandamus* to declare an election? *State v. Sims*, 1, 460
2. No clerk of court could be elected at general election in 1880. *Id.* 2, 460

## EQUITABLE DEFENSE.

See ACTIONS, 3.

## ESTOPPEL.

1. Wife not estopped as to third lien from asserting her first lien by reason of signing a second lien, or by payments made thereon and to others. *Carter v. DuPre*, 2, 179
2. Adult parties to void partition proceedings, who receive purchase-money, estopped from questioning title of purchasers. *Herndon v. Moore*, 6, 339
3. Can purchaser of shares deny existence of corporation? *Kerchner v. Gettys*, 3, 521

## EVIDENCE.

See WITNESSES.

1. Any competent testimony is admissible on a question of legitimacy, and if it convinces, is sufficient. *Wilson v. Babb*, 2, 59
2. Proceedings in adjudging plaintiff a lunatic are proper evidence in action brought by such lunatic to recover land sold during his lunacy under action to which he was no party. *Cathcart v. Sugenheimer*, 1, 123

3. Parol evidence cannot affect liability of endorsee who endorsed in blank. *Bank v. Gary*, 2, 282
4. Recitals in deed of M., evidence for E.'s grantee, if E. claimed by presumed grant, but not if by adverse possession. *Ellen v. Ellen*, 2, 489
5. And declarations of M. made before E.'s possession, are in like manner admissible or not. *Id.* 3, 489
6. Declaration in support of adverse claim, not generally admitted in reply. *Id.* 4, 489
7. Comparison of handwriting may be made in aid of doubtful proof. *Benedict v. Flanigan*, 1, 506
8. Whether doubtful, must be determined by the trial judge, and his ruling not generally disturbed. *Id.* 2, 506
9. Ownership of note admitted by answer cannot be questioned at trial on proof of endorsement for collection only. *Sawyer v. Macaulay*, 7, 543
10. Party may not testify to purchase of note from one deceased, but may say he owns it, and that, with possession, will sustain action. *Coleman v. Dunlap*, 1, 591
11. Judge erred in receiving parol testimony as to interest on a bond, but his judgment not being based thereon, new trial not granted. *Miller v. Edwards*, 2, 600
12. Parol license from a tenant to flood lands, inadmissible as evidence. *Simonds v. Hathcock*, 604
13. Testimony not pertinent to the issue properly excluded. *McGrath v. Barnes*, 606

## EXECUTIONS.

See JUDGMENTS.

1. Judgment and execution necessary to title; sale is not affected by irregularities in them, but is where they are void. *Tobin v. Myers*, 1, 324

2. Sheriff chargeable with notice of executions in his office. *State v. Boles*, 2, 534
3. Against administrator not entitled to money realized thereon, prior demands of the administration being unpaid. *Charles v. Jacobs*, 598

#### EXECUTORS AND ADMINISTRATORS.

1. Executor not chargeable with cotton sold by his co-executor. *Tompkins v. Tompkins*, 1, 1
2. Estate liable for debts incurred in winding up partnership after death of testator, but not for new business. *Id.* 4, 2
3. Not chargeable with Confederate securities left by testator. *Id.* 8, 2
4. Debt due to one executor not paid by confederate money in the other's hands. *Id.* 9, 2
5. Not chargeable with uncollected notes presented at trial. *Id.* 11, 2
6. Allowed credit for payment of valid debt, although judgment informal. *Id.* 12, 2
7. How their accounts should be stated. *Id.* 13, 2
8. Legatee who received cotton in 1865, charged with its gold value. *Id.* 14, 2
9. Charged with interest on decree against them, funds not being kept in hand. *Id.* 15, 3
10. Executor, when in Court of Equity, need not account before ordinary, and does not forfeit commissions for failure to do so. *Id.* 16, 3
11. No forfeiture of commissions for failure to make returns since 1872. *Id.* 17, 3
12. Entitled to commissions where funds practically passed through their hands. *Id.* 18, 3
13. Instance of power given to executors lapsing. *Bell v. Towell*, 3, 94

14. Discretion given to executors cannot be controlled unless its exercise is refused. *Gunter v. Gunter*, 2, 193
15. Payment of mortgage debt to one executor is satisfaction, although transfer to executors as trustees within the year appeared in their returns, but not on the mortgage. *Hyatt v. McBurney*, 4, 199
16. When payments to distributees are justifiable. *Graves v. Spoon*, 2, 386
17. Decree charging one executor only sustained. *Witherspoon v. Watts*, 1, 396
18. When executors will be removed from office. *Id.* 2, 396
19. Executor held not liable for losses on renewal notes and new notes taken by him without security from parties then solvent. *Pope v. Mathews*, 444
20. Administrator *pendente lite* may sue for debt due intestate. *Kaminer v. Hope*, 2, 3, 561
21. Foreign executors cannot sue in this State without letters here issued. *Patterson v. Pagan*, 3, 584
22. Execution against administrator not entitled to money realized on the judgment, prior demands of the administration being unpaid. *Charles v. Jacobs*, 598

#### FORFEITED LANDS.

See TAXES, 2, 3, 4.

#### FRAUD.

1. Statute of limitations does not run until right of action exists, even where fraud is known. *Suber v. Chandler*, 2, 4, 526
2. Equity will not permit the statute in such case to protect a fraud. *Id.* 6, 526

#### FREEDMEN.

See HUSBAND AND WIFE, 4.

## FUTURES.

See CONTRACTS, 3.

## GAMING.

Action by informer to recover money lost at play must state that the loss was at one time or sitting. *Trumbo v. Finley*, 1, 305

## GENERAL ASSEMBLY.

Cannot authorize sale of property of persons not *sui juris*. *Herndon v. Moore*, 3, 339

## GENERAL STATUTES OF 1872.

1. Chap. XX., §§ 46, 47, deposit by clerk of official moneys, construed. *State v. Moses*, 372
2. Chap. LXXIX., §§ 6, 7, suits for money lost at play, construed. *Trumbo v. Finley*, 310
3. Chap. LXXXV., § 9, as to after-acquired property of testator, construed. *Bell v. Towell*, 1, 94
4. Chap. LXXXVIII., § 17, forbidding distribution for one year, stated. *Pearson v. Carlton*, 55
5. Chap. XCVI., § 6, homestead for widow and children, considered. *Hardin v. Howze*, 78
6. Chap. CXI., § 25, as to examination of juror on *voir dire*, construed. *Gunter v. Graniteville Man. Co.*, 274

## GENERAL STATUTES OF 1882.

1. Section 160 did not authorize an election of clerk of court in 1882. *State v. Sims*, 1, 460
2. Section 1837, complaint for betterments, when to be filed. *Garrison v. Dougherty*, 486
3. Section 1875, as to probate of foreign wills, construed. *Patterson v. Pagan*, 589
4. Section 1882, oath of executors, stated. *Id.* 589

5. Section 1949, action against devisee referred to. *Earle v. Harrison*, 337

6. Section 2081, as to laborers' contracts, does not prevent contract at common law. *Huff v. Watkins*, 512

7. Section 2483, statutory burglary, necessary averments in indictment for. *State v. Evans*, 1, 137

## HOMESTEAD.

1. Conditions upon which allowed by the constitution. *Hardin v. Howze*, 2, 73
2. Where allowed by this court to an infant claimant upon certain conditions, the Circuit judge erred in limiting his right to his minority. *Id.* 3, 74
3. Exemption of personal property may be allowed to one not a land owner. *Oliver v. White*, 1, 235
4. Are type, press and printing material, tools? *Id.* 2, 235
5. Cannot be claimed against city taxes, although no certificate endorsed on execution. *Id.* 3, 235
6. Sheriff not liable for levy on property exempt, no claim for homestead being made. *Id.* 4, 235
7. Junior judgment creditor may require mortgagee to exhaust first the debtor's homestead. *Bank v. Harbin*, 425

## HUSBAND AND WIFE.

See CHILDREN; DOWER.

1. When a trust will be raised for a married woman. *Howard v. Henderson*, 2, 3, 184
2. No trust for married woman in deed executed for her separate use after 1868. *Id.* 2, 184
3. Action against married woman as surety, need not state that she has a separate estate. *State v. Moses*, 2, 367

4. Marriage of negroes by statutes of 1866 and 1872, declared. *Christopher v. Christopher*, 1, 600
5. Wife may claim support from her husband as distinct relief. *Id.* 3, 600
6. A married woman can be sued on her contract. *Long v. Schmidt*, 1, 604
7. Payment to husband of wife's inheritance sufficient, wife having waived her equity. *Foster v. Fowler*, 2, 607

#### ILLEGAL CONTRACTS.

See CONTRACTS, 3, 4.

#### IMPROVEMENTS.

1. Complaint for betterments must be filed within forty-eight hours of the Circuit judgment, which is the final judgment. *Garrison v. Dougherty*, 486
2. Tenants not allowed for, erected after action brought for partition. *Johnson v. Harrelson*, 604

#### INFANTS.

Business appertaining to minors, means peculiar to minors. *Herndon v. Moore*, 5, 339

#### INJUNCTION.

After verdict, judge may grant, to restrain further overflow. *Simonds v. Haithcock*, 604

#### INTEREST.

1. Allowed here on open account. *Tompkins v. Tompkins*, 6, 2
2. Claim in judgment allowed against receiver's fund not entitled to interest. *Ex parte Brown and Wife*, 1, 87
3. Audited county claim does not bear. *Wheeler v. Newberry*, 3, 132
4. Bond here drew annual interest after maturity? *Miller v. Hall*, 2, 141  
*Miller v. Edwards*, 600

#### JOINT RESOLUTIONS

Of 1878 (16 *Stat.* 681), authorizing funding of past county indebtedness, considered. *Wheeler v. Newberry*, 136

#### JUDICIAL SALES.

See SALES.

#### JUDGMENTS

1. Judgment and execution necessary to title; sale is not affected by irregularities in them, but is where they are void. *Tobin v. Myers*, 1, 324
2. Presumed paid in twenty years, although renewed *ex parte*. *Id.* 2, 324
3. Decree different from what was intended, reversed. *Graves v. Spoon*, 1, 386
4. Sheriff cannot refuse to enforce judgment against sureties because smaller judgment against principal is satisfied. Sureties are bound. *Noble v. Cothran*, 1, 3, 439
5. Sureties cannot plead unsatisfied judgment against principal as a bar. *Id.* 2, 439
6. Circuit decree erroneous, if inconsistent with a prior decree in same cause. *Charles v. Jacobs*, 598
7. Form of verdict immaterial where the judge passes judgment, which, if answer put in, is not limited by prayer for relief. *Id.* 4, 598
8. Cannot be objected to because it does not appear on its face to have been rendered in open court. *Christian v. Lebeschultz*, 1, 602
9. After verdict judge may grant order of injunction to restrain further overflow. *Simonds v. Haithcock*, 604

#### JURIES AND JURORS.

See CHARGING JURIES.

Employe of defendant rejected by judge as a juror. *Held*, that this court could not interfere. *Gunter v. Graniteville Man. Co.*, 4, 263

## JURISDICTION.

See COURTS.

## LANDLORD AND TENANT.

Landlord cannot himself eject tenant holding over, but if tenant leaves may enter and seize crops. *Sharp v. Kinsman*, 4, 5, 108

## LEGACIES AND LEGATEES.

1. Legatee who received cotton in 1865 charged with gold value. *Tompkins v. Tompkins*, 14, 2
2. Bequest of money here held specific. *Witherspoon v. Watts*, 5, 396
3. Property purchased with proceeds of a specific devise and turned over to legatee must be accounted for out of the estate, or by legatee. *Id.* 9, 397

## LICENSE.

1. Parol license from a tenant to flood lands, inadmissible as evidence. *Simonds v. Halthcock*, 604
2. To SELL LIQUORS. (See *Criminal Law*) The three-gallon act is not now of force. *State v. Turner*, 2, 103
3. Sale of liquors may be constitutionally prohibited. *Id.* 4, 103
4. An act prohibiting sale of liquor in Chester does not violate Art. I., § 12, of the constitution. *State v. Chester*, 2, 464

## LIENS.

Contract for rent carries with it a lien on crops. *Carter v. DuPre*, 1, 179

## LIMITATION OF ACTIONS.

1. Mortgage may be foreclosed although note barred by statute. *Nichols v. Briggs*, 3, 474
2. A statute of limitations as to contracts secured by mortgage, held not retroactive. *Id.* 2, 473

3. Action for error in settlement of sealed note is barred in six years. *McMakin v. Gowan*, 1, 502

4. Action being on agreement and not on sealed note, was barred. *Id.* 3, 502

5. Statute does not run against action to set aside voluntary deed until judgment is exhausted on the debt. *Suber v. Chandler*, 1, 3, 5, 526

6. Statute does not run until right of action exists, even where fraud is known. *Id.* 2, 4, 526

7. Equity will not, in such case, permit the statute to protect a fraud. *Id.* 6, 526

8. Contract made in another State governed by statute of this State. *Sawyer v. Macaulay*, 6, 543

## LIMITATION OF ESTATES.

Under deed to B. in trust for A. for life with remainder to C. (a married woman) and contingent remainders over, legal estate was vested in A. for life. *Howard v. Henderson*, 1, 184

## LUNATICS.

1. Proceedings in adjudging plaintiff a lunatic are proper evidence in action brought by such lunatic to recover land sold during his lunacy, under action to which he was no party. *Cathcart v. Suganheimer*, 1, 123

2. Action at law for recovery of property or damages must be brought in lunatic's name, but committee may sue alone for equitable relief. *Id.* 3, 123

3. And lunatic's property being sold by order in chancery, purchaser making improvements is subrogated to rights of creditors paid by the sale. *Id.* 4, 123

## MANDAMUS.

1. Should audited county claim be enforced by mandamus or action? *Wheeler v. Newberry*, 1, 132

2. When it may issue. *State v. Fuller*, 1, 246
3. Will not issue to require payment by county treasurer of auditor's check not approved by county commissioners. *Id.* 2, 246
4. Can State canvassers be required by, to declare an election? *State v. Sims*, 1, 460
5. Duty imposed upon county by legislature is a ministerial duty enforceable by mandamus. *County Commissioners v. Co. Comrs.*, 2, 3, 597
6. Neither damages nor costs allowed in mandamus. *Id.* 4, 597

### MARRIED WOMEN.

*See* HUSBAND AND WIFE.

### MARSHALING ASSETS.

Junior judgment creditor may require mortgagee to exhaust first the debtor's homestead. *Bank v. Harbin*, 425

### MASTER AND SERVANT.

1. A workman employed to keep machinery in repair not a fellow-servant of a weaver in the factory. *Gunter v. Graniteville Man. Co.*, 2, 262
2. Master liable for injury done to his laborer by the negligence of himself or his representative. Difference between fellow-servant and master's representative defined. *Id.* 3, 282
3. Whether machinery, &c., are in proper repair, it is the master's duty to ascertain. *Lasure v. Graniteville Man. Co.*, 3, 276
4. In what cases a master is liable for injuries sustained by his servant. *Id.* 4, 276
5. Action may be maintained for employment of agricultural servant, although contract with plaintiff not

witnessed. Relation may still exist at common law. *Huff v. Watkins*, 510

### MAXIMS.

*See* WORDS AND PHRASES.

### MORTGAGES.

1. May be foreclosed, although note barred by the statute. *Nichols v. Briggs*, 3, 474
2. Purchase by mortgagee at foreclosure sale does not discharge the debt; the transferee of the bid is the purchaser. *Cleveland v. Cohrs*, 2, 599
3. Mortgagor cannot claim benefit from a foreclosure sale set aside on his motion. *Id.* 3, 599
4. CHATTEL. Not void because it covers goods afterwards acquired in current business in lieu of those sold. *Hirshkind & Co. v. Israel*, 2, 157
5. Such mortgage cannot be resisted by second mortgagee unless he show purchases after his mortgage. *Id.* 3, 157
6. May not cover advances made after second lien, but can cover future acquisitions for existing debt. *Id.* 4, 157

### NATIONAL BANKS.

1. Of another State may be sued here. *Holmes & Durham v. Bank*, 1, 31
2. In such action, attachment may issue before judgment. *Id.* 2, 31

### NEGOTIABLE INSTRUMENTS.

1. A note with a pledge of collaterals written thereon and a sale authorized and a promise to pay deficiency on such sale, is negotiable. *Bank v. Gary*, 1, 282
2. Endorsement in blank makes endorser liable to all subsequent holders and parol evidence cannot affect it. *Id.* 2, 282

3. Ownership of note admitted by answer cannot be questioned at trial, on proof of endorsement for collection only. *Sawyer v. Macaulay*, 7, 543
4. Endorser waived protest, paid note and re-issued it. *Held*, that he was liable. *Coleman v. Dunlap*, 2, 591
5. Notice of non-payment unnecessary where endorser holds indemnity. *Id.* 3, 591
6. Suit for foreclosure a demand on principal and notice to endorser. *Id.* 4, 591
7. Re-issue of note made endorser liable as drawer of bill, and demand on maker unnecessary. *Id.* 5, 591
6. "Matters testamentary and of administration," does not include partition. *Id.* 4, 339
7. Adult parties to void partition proceedings who receive purchase-money, estopped from questioning title of purchasers. *Id.* 6, 339
8. Tenants not allowed for improvements erected after action brought for partition. *Johnson v. Harrelson*, 604

## PARTNERSHIP.

1. Estate liable for debts incurred in winding up partnership after death of testator, but not for new business. *Tompkins v. Tompkins*, 4, 2
2. Communion of profits and losses true test of a partnership. *Chapman v. Lipscomb*, 6, 223
3. Agreement to have one-half of brick made for laborers furnished, not a partnership. *Id.* 7, 223

## NON-SUIT.

See PRACTICE, 5.

## PARENT AND CHILD.

See CHILDREN.

## PARTIES.

See PLEADINGS, 10.

## PARTITION.

1. Where property was partitioned and one-third allotted to the widow, she paying owelty, an heir not a party, the heirs of a party who died before judgment, nor a posthumous child, are bound by the proceedings. *Pearson v. Carlton*, 1, 2, 4, 7, 47
2. The purchaser at sale of the remainder must account for rents. *Id.* 3, 47
3. Will ordered sale, partition may be had only by consent. *Bell v. Twell*, 7, 95
4. Legislature cannot authorize, by probate courts. *Herndon v. Moore*, 1, 339  
*Schumpert v. Smith*, 358
5. Partition in probate courts prior to case in 10 S. C. 317, binding. *Id.* 2, 339  
*Ibid.* 358
2. Payment of mortgage debt to one executor is satisfaction, although transfer to executors as trustees within the year appeared in their returns, but not on the mortgage. *Id.* 4, 199
3. Payment to husband of wife's inheritance sufficient, wife having waived her equity. *Foster v. Fowler*, 2, 607

## PAYMENT.

## PLEADINGS.

1. COMPLAINT sufficiently charges acceptance of draft in stating acceptance by agent. *Long v. Schmidt*, 1, 604
2. COUNTER-CLAIM. In action for damages for trespass on leased premises, arrears of rent no proper counter-claim. *Sharp v. Kinman*, 7, 108

3. The value of company bonds deposited by receiver for payment of loan, and sold, could not be asserted by other creditors as a counter-claim to balance due on such loan. *Ex parte Carolina National Bank*, 3, 289
4. DEMURRER proper where complaint states no legal cause of action. Motion to make pleadings more definite not necessary. *Trumbo v. Finley*, 2, 305
5. Amendment after, in discretion of Circuit judge. *Id.* 3, 305
6. Unless cause of action shown by complaint, it will be dismissed on demurrer as in this case. *Chalmers v. Glenn*, 1, 2, 469
7. Complaint not stating facts sufficient dismissed on oral demurrer, without reading answer. *Davis v. McDuffie*, 1, 495
8. Objection to matter not clearly appearing in the complaint should not be taken by demurrer. *Patterson v. Pagan*, 2, 584
9. Objection cannot be taken by demurrer unless the objection appears in the complaint. *Ross v. Linder*, 605
10. PARTIES. Action at law for recovery of property or damages, must be brought in lunatic's name, but committee may sue alone for equitable relief. *Cathcart v. Sugenheimer*, 3, 123
11. Action on clerk's bond may be brought in the name of the State, but objection can be raised only by demurrer. *State v. Moses*, 1, 366
12. Real claimant brought in as defendant may deny plaintiff's capacity to sue. *Patterson v. Pagan*, 1, 584
13. In action for obstructing a street in violation of a grant, the corporation is a necessary party. *Kibler v. Luther*, 2, 606

POWERS.

1. Instance of power given to executors lapsing. *Bell v. Towell*, 3, 94

2. Discretion given to executors cannot be controlled unless its exercise is refused. *Gunter v. Gunter*, 2, 193
3. Will construed to give discretion only as to investments, but duty imposed of providing for children, which duty should be enforced. *Id.* 3, 193

PRACTICE.

1. AMENDMENTS. After demurrer in discretion of Circuit judge. *Trumbo v. Finley*, 3, 305
2. Refusal to permit, stating new cause of action after oral demurrer sustained, not disturbed. *Id.* 4, 305
3. ANSWER. Part of, properly stricken out as irrelevant. *Nichols v. Briggs*, 1, 473
4. EXCEPTIONS to incompetent testimony before master not before this court, no exceptions being taken to Circuit decree. *Chapman v. Lipscomb*, 9, 223
5. NON-SUIT. Order refusing, not disturbed, no error of law appearing. *Sharp v. Kinsman*, 1, 108
6. Where there is some evidence on point at issue, non-suit improper. *State v. Boles*, 1, 534
7. Order refusing non-suit sustained, verdict being for plaintiff. *Gilmore v. Roberts*, 2, 551
8. In action for trespass, refusal to non-suit is not error, there being evidence of plaintiff's possession and defendant's trespass, and a verdict for plaintiff. *Jowers v. Stansell*, 607
9. REFEREES. If law and facts not separately reported, motion to recommit is remedy. *Chapman v. Lipscomb*, 2, 222
10. Is the finding of a referee as controlling upon the judge as the verdict of a jury? *Ross v. Linder*, 1, 605
11. TRIAL. Objection to competency of witness must be taken at. *Tompkins v. Tompkins*, 3, 2



12. Legal and equitable issues must be separately tried. *Chapman v. Lipscomb*, 4, 222

13. Admission of testimony at any stage is within judge's discretion. *Christian v. Lebeschultz*, 3, 602

14. VERDICT for penalty not vitiated by additional findings for parties. Proper practice indicated. *State v. Moses*, 4, 387

15. Held void for uncertainty and properly vacated at third subsequent term. *Eason v. Miller*, 1, 381

16. Form of verdict immaterial where the judge passes judgment, which, if answer put in, is not limited by the prayer for relief. *Christopher v. Christopher*, 4, 600

#### PRESUMPTIONS.

1. Judgment presumed paid in twenty years, although renewed *ex parte*. *Tobin v. Myers*, 2, 324

2. In the absence of testimony, judgment assumed to have been rendered in open court. *Christian v. Lebeschultz*, 2, 602

#### PRINCIPAL.

See AGENT; SURETIES.

#### PROBATE COURTS.

See COURTS, 6.

#### PURCHASERS.

1. Lunatic's property sold by order in Chancery, to which he was no party, purchaser making improvements is subrogated to rights of creditors paid by the sale. *Cathcart v. Sugheimer*, 4, 123

2. Of bonds of a railroad company which was in the hands of a receiver, not liable for their value to creditors of the corporation. *Ex parte Williams*, 299

3. Purchase by mortgagee at foreclosure sale does not discharge the debt; the transferee of the bid is the purchaser. *Cleveland v. Cohrs*, 2, 599

#### RAILROADS.

1. Rates by common carriers must be reasonable, but not necessarily uniform. *Ex parte Benson*, 1, 38

2. When not restrained by statute, may contract just as natural persons do. *Id.* 2, 38

3. Rebate contract not illegal, and binding on a railroad and its creditors. *Id.* 3, 38

4. And such contract having been made by receivers, is payable out of receiver's fund. *Id.* 4, 38

5. Claim in judgment allowed against receiver's fund, not entitled to interest. *Ex parte Brown*, 1, 87

6. Sureties to railroad agent's bond are discharged if the company conceals agent's indebtedness and holds him out as trustworthy, but not if on default, notice is not given to sureties, as company was not bound to notify them of each default, nor to inform them that agent was indebted when bond was given. *Railroad Company v. Ling*, 116

7. Money borrowed by receiver should be repaid out of receiver's funds. *Ex parte Bank*, 2, 289

8. Purchaser of bonds of a railroad company, which was in the hands of a receiver, not liable for their value to creditors of the corporation. *Ex parte Williams*, 299

#### RECEIVERS.

See RAILROADS, 4, 5, 7, 8.

#### RECOVERY OF REAL PROPERTY.

The absence of canal on plat in partition not conclusive, the common grantor of litigants having marked

it out on another plat, and it being referred to in title deeds as boundary. *Charleston, &c., v. Bennett*, 1, 254

# REFORMING INSTRUMENTS.

A clerk lent money under terms of order. *Held*, that his successor could not ask to have bond reformed so as to carry interest. *Chalmers v. Glenn*, 3, 469

# REMOVAL OF CAUSES.

Petition for removal refused, not being filed in time and proper facts not appearing from the record. *Hyatt v. McBurney*, 2, 199

# RENTS.

1. Purchaser at partition sale must account for rents to tenants not parties. *Pearson v. Carlton*, 3, 47
2. Contract for rent carries with it a lien on crops. *Carter v. DuPre*, 1, 179

# RES JUDICATA.

1. Where property was partitioned and one-third allotted to the widow, she paying owelty, an heir not a party, the heirs of a party who died before judgment, nor a posthumous child, are bound by the proceedings. *Pearson v. Carlton*, 1, 2, 4, 7, 47
2. The satisfaction of a mortgage was decreed to be fraudulent. *Held*, not to be *res judicata* as to subsequent mortgagee not a party. *Hyatt v. McBurney*, 1, 199
3. Where rule on master to require terms of sale to be complied with, is discharged, the purchaser's only further remedy is appeal. *Davis v. McDuffie*, 3, 495
4. Circuit decree erroneous if inconsistent with a prior decree in same cause. *Charles v. Jacobs*, 598
5. Matter involved in a decree cannot be again moved in the cause. *Symmes v. Symmes*, 2, 601

6. Witness in a cause not bound by a decree, he being no party. *Whaley v. Houser*, 3, 602

# RULES OF COURT.

Rule 72, Circuit Court, effect upon costs. *Bratton v. Massey*, 2, 560

# SALES.

1. Policy of law is to support judicial sales. *Cathcart v. Sugenheimer*, 2, 123
2. Legislature cannot authorize sale of property of persons not *sui juris*. *Herndon v. Moore*, 3, 339
3. Action for specific performance against master refused here, terms not being complied with on day of sale. *Davis v. McDuffie*, 2, 495
4. Mortgagor cannot claim benefit from a foreclosure sale set aside on his motion. *Cleveland v. Cohrs*, 3, 599
5. OF PERSONAL PROPERTY. Where party was to have half of brick made in payment for laborers furnished, the maker could sell his interest in the brick without regard to his indebtedness to the other party. *Chapman v. Lipscomb*, 8, 223
6. OF SEED COTTON. See *Criminal Law*, 9,

# SERVANTS.

See MASTER AND SERVANT.

# SHERIFF AND SHERIFFS' SALES.

1. Sheriff not liable for levy on property exempt, no claim for homestead being made. *Oliver v. White*, 4, 235
2. Sheriff's sales not affected by irregularities in judgment and execution but are where they are void. *Tobin v. Myers*, 1, 324
3. Sale under judgment 20 years old, void. *Id.* 3, 324

4. Sheriff cannot refuse to enforce judgment against sureties because smaller judgment against principal is satisfied. *Noble v. Cothran*, 1, 439
5. Chargeable with notice of executions in his office. *State v. Boles*, 2, 534

## STATUTES.

1. Act prescribing punishment where not otherwise fixed applies to prior and subsequent statutes. *State v. Turner*, 5, 103
2. Amendment of obscure statute does not show that it was incapable of execution. *State v. Padgett*, 4, 317
3. An act in which certain towns are excepted from its operation, *e. g.*, local option, relates to one subject only expressed in its title. *State v. Chester*, 1, 464
4. Act 27 Hen. VIII., ch. 10, (2 Stat. 466,) statute of uses, applied. *Howard v. Henderson*, 188
5. Act 22 and 23 Ch. II., ch. 10, (2 Stat. 524,) forbidding distribution for one year, stated. *Pearson v. Carlton*, 55
6. Act 1759, (4 Stat. 102,) probate of foreign wills, stated. *Patterson v. Pagan*, 590
7. Act 1783, (4 Stat. 565,) three-gallons act has been superseded. *State v. Turner*, 2, 103
8. Act 1789, (5 Stat. 112,) forfeiture by executor of commissions and its repeal, stated. *Tompkins v. Tompkins*, 29
9. Act 1791, (5 Stat. 163,) as to after-acquired property, stated. *Bell v. Towell*, 99
10. Act 1808, (5 Stat. 573,) as to after-acquired property, stated. *Id.* 99
11. Act 1839, (11 Stat. 38,) applies only to judgments where no executions have been lodged. *State v. Boles*, 2, 534
12. Act 1858, (12 Stat. 700,) as to after-acquired realty governs wills of testators afterwards dying. *Bell v. Towell*, 1, 94
13. Act 1865, (13 Stat. 290,) declaring negroes married, stated. *Christopher v. Christopher*, 1, 600
14. Act 1868, (14 Stat. 77,) giving probate court jurisdiction in partition is unconstitutional. *Herndon v. Moore*, 349
15. Act 1869, (14 Stat. 172,) as to sheriff selling homestead, considered. *Oliver v. White*, 242
16. Act 1870, (14 Stat. 380,) allowing exemption of personality, not unconstitutional. *Id.* 1, 235
17. Act 1872, (15 Stat. 183,) declaring negroes married, construed. *Christopher v. Christopher*, 1, 600
18. Act 1873, (15 Stat. 332,) selling property covered by lien without notice, stated. *Williams v. Walker*, 580
19. Act 1873, § 5, (15 Stat. 371,) homestead not to be waived, considered. *Bank v. Harbin*, 434
20. Act 1873, (15 Stat. 496,) amending code as to limitation of actions on sealed instruments, stated. *Nichols v. Briggs*, 2, 473
21. Act 1874, §§ 116, 117, (15 Stat. 772,) as to tax titles, considered. *State v. Thompson*, 3, 538
22. Act 1875, § 23, (15 Stat. 993,) repealed act of 1874 which permitted payment of auditor's check. *State v. Fuller*, 253
23. Act 1876, (16 Stat. 194,) as to checks by county commissioners, construed. *Id.*, 252
24. Act 1877, (16 Stat. 266,) prohibiting sale of seed cotton, construed. *State v. Padgett*, 318
25. Act 1878, (16 Stat. 311,) appointment of commission to ascertain county indebtedness, construed. *Wheeler v. Newberry*, 2, 132
26. Act 1878, (16 Stat. 411,) gives landlord lien for rent. *Carter v. Du Pre*, 1, 179

27. Act 1878, (16 Stat. 453,) declaring punishment where not otherwise fixed, construed. *State v. Turner*, 5, 103
28. Act 1878, (16 Stat. 631,) did not repeal act of 1866 as to burglary. *State v. Evans*, 139
29. Act 1878, (16 Stat. 689,) stock law for Abbeville, stated. *County Commissioners v. Co. Com'rs*, 597
30. Act 1878, (16 Stat. 692,) for settling debt of Charleston, stated. *Wheeler v. Newberry*, 135
31. Act 1878, (16 Stat. 777,) as to assessment by board of assessors, construed. *State v. Thompson*, 2, 538
32. Act 1879, (17 Stat. 3,) to prevent intermarrying of races, stated. *State v. Paulk*, 515
33. Act 1879, (17 Stat. 69,) time when acts take effect, construed. *State v. Mancke*, 81
34. Act 1880, (17 Stat. 303,) as to costs in equity causes, construed. *Bratton v. Massey*, 2, 555
35. Act 1880, (17 Stat. 368,) has no application to appeals from trial justice. *Foot v. Williams*, 601
36. Act 1880, (17 Stat. 412,) stock law for portion of Edgefield, considered. *County Commissioners v. Co. Com'rs*, 597
37. Act 1880, (17 Stat. 415,) amending statute of limitations in cases of mortgage, not retroactive. *Nichols v. Briggs*, 2, 473
38. Act 1880, (17 Stat. 459,) forbidding sale of liquors in the country, construed. *State v. Turner*, 3, 163
39. Same act construed and held constitutional. It went into effect on its passage. *State v. Mancke*, 81
40. Act 1880, (17 Stat. 475,) as to time of unlawful sale of seed cotton, considered. *State v. Padgett*, 320
41. Act 1882, § 4, (17 Stat. 893,) local option law, sufficiently expressed in its title. *State v. Chester*, 1, 464

42. Act 1882, (17 Stat. 1059,) prohibiting sale of liquor in Chester, does not violate constitution, Art. I., § 12. *Id.*, 464

## STATUTE OF USES.

See TRUSTS.

## STREETS.

Right to use of canal cannot be defeated by dedication to the public of a street across it, which street was never used nor prepared for use. *Charleston Rice Milling Co. v. Bennett*, 2, 254

## SURETIES.

1. Cannot recover from co-surety money used to pay their common debt. *Tompkins v. Tompkins*, 10, 2
2. Sureties to railroad agent's bond are discharged if the company cancels agent's indebtedness and holds him out as trustworthy, but not if on default notice is not given to sureties, as company was not bound to notify them of each default, nor to inform them that agent was indebted when bond was given. *Railroad Co. v. Ling*, 116
3. Clerk and his sureties on second bond liable for moneys received during first bond and never deposited or paid out by him as required by law. *State v. Moses*, 3, 367
4. Sureties bound by judgment, although smaller judgment against principal is satisfied. *Noble v. Cochran*, 3, 439
5. Cannot plead unsatisfied judgment against principal as a bar. *Id.*, 2, 439
6. Endorsement for collection does not make endorser co-surety in North Carolina. *Sawyer v. Macaulay*, 3, 543

## TAXES AND TAX SALES.

1. Homestead cannot be claimed against city taxes, although no certificate endorsed on execution. *Oliver v. White*, 3, 235

2. Forfeited land title not *prima facie* good as in case of delinquent sales. *State v. Thompson*, 3, 538
3. What necessary to forfeiture of land for non-payment of taxes. *Id.* 1, 538
4. Assessment by board must be in writing and cannot be proved by parol. *Id.* 2, 538
5. Fence between two counties to be kept in repair by one, tax may be required to be raised by the other county for its repayment. *County Commissioners v. Co. Comrs.*, 1, 597

## TRESPASS.

On property in constructive possession of plaintiff always justified action of trespass *q. c. f.*, but now the action may be brought if plaintiff has title. *Gilmore v. Roberts*, 1, 551

## TRIAL JUSTICES.

1. Not liable for not returning property seized by his constable under execution issued within five days after judgment rendered for it, judgment being afterwards set aside, and no willful or corrupt motive being shown. *Abrams v. Carlisle*, 242
2. Warrant of arrest is not assumption of jurisdiction by. *State v. Padgett*, 3, 317
3. Verbal notice to trial justice of appeal not sufficient. *Foot v. Williams*, 601

## TRUSTS AND TRUSTEES.

1. Under deed to B. in trust for A. for life with remainder to C. (a married woman) and contingent remainders over, legal estate was vested in A. for life. *Howard v. Henderson*, 1, 184
2. When a trust will be raised for married women or to support contingent remainders. *Id.* 2, 3, 184
3. No trust for married woman in deed executed for her separate use after 1868. *Id.* 2, 184

4. Statute may execute use for some parties and not for others. *Id.* 4, 184
5. Payment of mortgage debt to one executor is satisfaction, although transfer to executors as trustees within the year appeared in their returns, but not on the mortgage. *Hyatt v. McBurney*, 4, 199

## VERDICT.

See PRACTICE, 14.

## VOLUNTARY CONVEYANCES.

See LIMITATION OF ACTIONS, 5.

## WILLS.

1. Testator canceled all debts due by his sons and gave land to one on payment of \$5,500, which was amount agreed to be paid to him by such son in his life-time. The son declined to take the land *Held*, that nothing was due. *Tompkins v. Tompkins*, 2, 1
2. A will of 1857 passes after-acquired realty, where testator died in 1881. *Bell v. Twissell*, 1, 94
3. Should be read in light of surrounding circumstances. *Id.* 2, 94
4. Instance of power given to executors lapsing. *Id.* 3, 94
5. Where wife dies first, division directed at her death takes place at death of testator. *Id.* 4, 95
6. Limitations in one part of a will held not to attach to provisions in another. *Id.* 5, 95
7. Intention of testator cannot be declared the same in all parts of his will. *Id.* 6, 95
8. Will ordered sale—partition may be had only by consent. *Id.* 7, 95

9. Discretion given to executors cannot be controlled unless its exercise is refused. *Gunter v. Gunter*, 2, 193
10. Construed here to give discretion only as to investments, but duty imposed of providing for children, which duty should be enforced. *Id.* 3, 193
11. All parts of will must be construed in harmony. *Id.* 4, 193
12. Dower of widow renouncing a devise not primarily chargeable on such devise, but upon all the lands of testator. *Witherspoon v. Watts*, 3, 396
13. Funds of residuum used to pay such dower must be refunded out of the lands. *Id.* 4, 396
14. A beneficiary accepting under a will cannot claim adversely to a devise in such will. *Id.* 7, 397
15. Property given for life and absolutely to widow who renounces, vests instantly in the remaindermen or passes into the residuum. *Id.* 8, 397
16. Property purchased with proceeds of a specific devise and turned over to legatee, must be accounted for out of the estate, or by legatee. *Id.* 9, 397

WITNESSES.

1. Objection to competency of, must be taken at trial. *Tompkins v. Tompkins*, 3, 2
2. One witness here competent and one incompetent under section 415 of the code. *Earle v. Harrison*, 2, 329
3. Witnesses making comparison of handwriting need not be experts. *Benedict v. Flanigan*, 3, 506

WORDS AND PHRASES.

1. Posthumous child of intestate is a child left by such father. *Pearson v. Carlton*, 6, 47
2. Are type, press and printing material, tools? *Oliver v. White*, 2, 235
3. "Matters testamentary and of administration" does not include partition. *Herndon v. Moore*, 4, 339
4. "Business appertaining to minors," means peculiar to minors. *Id.* 5, 339
5. "Communis error facit jus," where and how applied. *Id.* 7, 339
6. Final judgment in betterment law means circuit judgment. *Garrison v. Dougherty*, 486

*E. L. A. A.*

'3302-67









